INDEX.

	Page.
Complaint	1
Answer	2
Trial	3
History of avenue and railroad	3
Decision	6
Judgment	8
Judgments in Appellate Courts	9
Alleged violations of Federal Constitution	9
To what these have relation	10
POINT I.: Judgment rests on due administration of previously existing rules of property law	13
Character of abutters' easements	13
Partake of character of proceedings and of subject matter thereof	13
Character subject to change	14
Status at avenue opening	16
How railroad affected by avenue opening	17
Created no additions to easements	17
What 1872 enactment dealt with	18
Status dealt with by 1892 enactment	19
What the State assumed to do	19
Scope of adjudications	19
What plaintiff's contention assumes	20
Plaintiff's case a condemnation proceeding	20
Case stood upon law and procedure antedating 1892 enactment	22
Adequate remedy available if trespass proven	23
Railroad not alleged to be public nuisance	24
Character of 1872 and 1892 enactments	24
Plaintiff not defeated by lack of remedial law or process	25
Character of adjudication herein	26
Legislation and judicial decisions to which this review pertains	26
Park Avenue Improvement cases, list of	27
Grounds of decision are local property law, existing prior to 1892	30
Error, if there be such, involves neither of the federal questions urged herein.	30
Damage actionable or non-actionable	31
Case at bar unlike elevated railroad cases	31
Avowed and effected object of 1892 enactment	32
Consequent proposition	33
Judgment herein founded on rules of law observance whereof preceded 1892 enactment	33
Failure of plaintiff's case has not resulted from want of due process of law	35
POINT II.: Constitutional inhibition of impairment of contract obligation not infringed by exercise of police power	39
Contract obligation is deemed subject to State's right of police power	42
POINT III.: State Court interpretation of its statutes of limitation not subject to federal review	46

Page.

POINT IV.: State Court rules of decision in respect of property having situs therein, and rights appurtenant thereto, are binding upon the federal courts 50

POINT V.: State laws consisting of rules of property and of liability in respect of consequential damage are not subject to federal governance.. 57

Doctrine of *damnum absque injuria* adjudged to govern herein is recognized as fundamental in New York and Federal Courts..... 57

Summary of argument presented..... 67

CASES CITED:

Albany *v.* Railroad Co., 108 N. Y., 14..... 17

Am. Bk. Note Co. v. N. Y. E. R.R. Co., 129 N. Y., 252..... 20

Atwater *v.* Trustees, 124 N. Y., 602..... 60

Bauman *v.* Ross, 167 U. S., 548..... 57

Bellinger *v.* N. Y. C. R.R. Co., 23 N. Y., 42..... 57

Benner *v.* Atlantic Dredging Co., 134 N. Y., 156..... 60

Bohm *v* M. E. R. Co., 129 N. Y., 576..... 20

Brown *v.* Colorado, 106 U. S., 95..... 43

Butchers Union Co. *v.* Cresent City Co., 111 U. S., 746..... 31, 42

Callender *v.* Marsh, 1 Pick., 417..... 57

Castillo *v.* McConnico, 168 U. S., 674..... 67

Chicago *v.* Taylor, 125 U. S., 161..... 57

Chicago, &c., R. Co. *v.* Nebraska, 170 U. S., 57..... 43

Coates *v.* Mayor, 7 Cowen, 584..... 40

Cogswell *v.* Railroad Co., 103 N. Y., 10..... 61

Conabeer *v.* N. Y. & Harlem R.R. Co., 156 N. Y., 474..... 28

Conklin *v.* Railroad Co., 102 N. Y., 107..... 59

Coster *v.* Mayor, 43 N. Y., 399..... 38

Davidson *v.* New Orleans, 96 U. S., 97..... 35

Davis *v.* Mayor, 14 N. Y., 506..... 24

Detroit *v.* St. Ry. Co., 184 U. S., 368..... 15

Detroit *v.* Osborne, 135 U. S., 492..... 51, 67

Dolan *v.* N. Y. & Harlem R.R. Co., 175 N. Y., 367..... 29, 66

Egerer *v.* N. Y. C. & H. R. R.R. Co., 130 N. Y., 108..... 22

Elder *v.* McClaskey, 17 C. C. A., 251..... 46

Eldridge *v.* Trezevant, 160 U. S., 452..... 31, 45

Eustis *v.* Bolles, 150 U. S., 361..... 18

Folmsbee *v.* Amsterdam, 142 N. Y., 118..... 61

Fries *v.* N. Y. & Harlem R.R. Co., 169 N. Y., 270..... 10

Gibson *v.* United States, 166 U. S., 269..... 64

Goszler *v.* Georgetown, 6 Wheat., 593..... 43

Green *v.* Neal, 6 Pet., 291..... 46

Gushee *v.* City of N. Y., 42 App. Div., 37..... 41

Hartford Ins. Co. *v.* Chicago, &c., R.R. Co., 175 U. S., 91..... 55

Heiser *v.* Mayor, 104 N. Y., 68..... 59

High Bridge Lumber Co. *v.* United States, 69 Fed., 320; 16 C. C. A., 460.... 57

Hill *v.* Mayor, 139 N. Y., 495..... 61

Hooker *v.* Burr, 194 U. S., 415..... 67

Hussner *v.* Railroad Co., 114 N. Y., 433..... 24

Leffingwell *v.* Warren, 2 Black, 599..... 49

Lewis *v.* N. Y. & Harlem R.R. Co., 162 N. Y., 202..... 28

	Page.
Livingston *v.* Moore, 7 Pet., 469	48
Lobenstine *v.* Union El. R. Co., 80 Fed., 9; 25 C. C. A., 304	46
Lord *v.* Thomas, 64 N. Y., 107	43
Marchant *v.* Pennsylvania R.R. Co., 153 U. S., 380	37, 57
Meyer *v.* Richmond, 172 U. S., 82	45
Miner *v.* Railroad Co., 123 N. Y., 242	15
Missouri Pac. R. Co. *v.* Humes, 115 U. S., 512	36
Monongahela Nav. Co. *v.* United States, 148 U. S., 312	31
Moran *v.* Horsky, 178 U. S., 205	18
Muhlker *v.* N. Y. & Harlem R.R. Co., 173 N. Y., 549	28
N. Y. & N. E. R. Co. *v.* Bristol, 151 U. S., 556	53
Park Ave. cases, list of	27
Pennsylvania College cases, 13 Wall., 190	43, 44
Pennsylvania R.R. Co. *v.* Miller, 132 U. S., 75	57
People *v.* O'Brien, 111 N. Y., 1	15
People *ex rel* N. Y. & Harlem R.R. Co. *v.* Havemeyer, 47 How. Pr., 494	27
Pierce *v.* Railroad Co., 171 U. S., 641	18
Presbyterian Ch. *v.* Mayor, 5 Cowen, 538	39
Pumpelly *v.* Green Bay Co., 13 Wall., 166	31
Radcliff *v.* Brooklyn, 4 N. Y., 195	57
Rauenstine *v.* N. Y., L. & W. R. Co., 136 N. Y., 528	61
Reining *v.* N. Y., L. & W. R. Co., 128 N. Y., 157	22
Remington Paper Co. *v.* Watson, 173 U. S., 443	38
Scranton *v.* Wheeler, 179 U. S., 141	62
Selden *v.* Del. & Hud. Canal Co., 29 N. Y., 634	58
Shelby *v.* Guy, 11 Wheat., 361	46
Sioux City R.R. Co. *v.* N. A. Trust Co., 173 U. S., 99	54
Slaughter House cases, 16 Wall., 36	42
Smith *v.* Corp. of Washington, 20 How., 135	57
Snell *v.* Leavitt, 110 N. Y., 595	15
Sperb *v.* M. E. R.R. Co., 137 N. Y., 155	20
Stone *v.* Mississippi, 101 U. S., 814	44
Talbot *v.* N. Y. & Harlem R.R. Co., 151 N. Y., 155	28
Tioga R.R. Co. *v.* Blossburg, &c., R. Co., 20 Wall., 137	49
Tocci *v.* Mayor, 73 Hun, 46	28
Townsend *v.* Todd, 91 U. S., 452	51
Transportation Co. *v.* Chicago, 99 U. S., 635	57
Tyler *v.* Registration Court, 179 U. S., 405	67
Uline *v.* N. Y. C. & H. R. R.R. Co., 101 N. Y., 98	58
Uppington *v.* City of N. Y., 165 N. Y., 222	62
Wabash R. Co. *v.* Defiance, 167 U. S., 88	57
Wade *v.* Travis County, 174 U. S., 499	55
Walker *v.* State Harbor Commrs., 17 Wall., 648	51
White *v.* M. R. Co., *et al.* 139 N. Y., 19	13
Woodruff *v.* Paddock, 130 N. Y., 618	15

Supreme Court of the United States.

HENRY MUHLKER,
Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendants in Error.

October Term, 1904. No. 99.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Facts.

This is a proceeding by writ of error to the Supreme Court of the State of New York (p. 100), allowed by his Honor Chief Judge Alton B. Parker (p. 101), to review a final judgment of and rendered and entered by that Court, at a Special Term thereof, dated March 5, 1903 (p. 75), upon and in conformity with the remittitur of the Court of Appeals (p. 1), dismissing upon the merits the complaint of the plaintiff in and by which he prayed an injunction alternative to compensation for and in respect of the maintenance and use of the permanent elevated viaduct structure and its appurtenances in Park Avenue, New York City, erected by the Board for the Park Avenue Improvement above 106th Street, under the provisions of Chapter 339 of the Laws of 1892, and amending acts, in front of the described premises of the plaintiff, plaintiff in error.

COMPLAINT.

The action was commenced January 7, 1897 (p. 3), and plaintiff Muhlker, in and by his amended complaint therein (pp. 4, 5), alleged ownership of therein described premises abutting upon Park avenue; that the avenue is a public street and he, as appurtenant to his said premises, has rights and easements therein; that defendant Harlem Company is the owner and Central Company is and since April, 1873, has been the lessee of the described railroad and structures; that for more than six years past the railroad has been maintained in the avenue in a depression or cut with ma-

sonry walls extending many feet above the surface of the avenue, and operated for the benefit of both defendants; that in or about April, 1893, defendants commenced the erection of the described elevated structure constituting a new, special and continuing injury to plaintiff; that by these acts of defendants plaintiff's premises have been and are deprived of light, air, access, ventilation, privacy, stability, quiet and other rights, and the said easements appropriated and thereby the value of the said premises and of the use thereof largely depreciated, to his damage; that defendants threaten and intend to add to and complete the elevated structure, and upon completion thereof to operate trains thereon by and with steam engines: that thereby said premises will be further deprived of light, air, access, etc., and the said easements further appropriated; that the said injuries will be constant and continuous trespass; that the said acts of defendants have been, are and will be without warrant of law, without his consent and compensation to him; he prayed judgment enjoining maintenance and use of the elevated structure;

> "or that the court shall determine the amount of damages to the fee value of said premises in consequence of the appropriation by defendants of plaintiff's said easements, as aforesaid, amounting, as the plaintiff alleges, to one hundred thousand dollars and over, and that, unless the defendants shall forthwith pay the same to the plaintiff, the defendants be enjoined from using the said elevated railway structure and depression, and from continuing the same opposite the said premises."

ANSWER.

The answers of the defendant railroad companies, *inter alia*, denied that they had built, or were building, or intended to add to or complete the elevated railroad structure; admitted ownership and lease of and previous maintenance and operation of the railroad and the purpose and intent to operate it on the elevated structure upon its completion; and further alleged:

That pursuant to the act of 1807, a map or plan of public streets was filed April 1, 1811, exhibiting Fourth avenue of the width of one hundred feet. That by the act of 1831 the N. Y. & Harlem R. R. Co. was incorporated to construct a railroad within the bounds and between the termini named, and in pursuance thereof located its road and made and duly filed a survey and map thereof which by resolution of October 22, 1831, was duly approved by the proper city authorities, which road as located, occupied a twenty-four foot strip of land having its center line coincident with the center line of Fourth avenue as exhibited on said city map.

That by ordinance of December, 1831, the city council granted permission for the building of the road upon conditions which were agreed to by and between the city and the railroad company of date January 9, 1832. That thereafter the railroad company acquired title to the said twenty-four foot strip of land extending from Harlem river to Forty-second street, including that in front of plaintiff's described premises, with the power of sloping embankments or excavations the full width of the avenue, and many years prior to the city's acquirement of title to the avenue the railroad company had its road constructed and in operation upon the said strip of land and so continued until the changes required by the acts of 1867 and 1872, respectively, were successively made. That by reason of the existence of the railroad, and in pursuance of the memorial of the Mayor, etc., the act of 1837 was passed altering the city map by adding twenty feet upon either side of this avenue.

That the railroad company's acquirement of its said title and building of its road was many years prior to plaintiff's acquirement of title, if he has any, to the premises described, all in pursuance of said act of incorporation and with the acquiescence of plaintiff's predecessors in title. That in pursuance of the act of 1848 the New York and New Haven (now New York, New Haven and Hartford) Railroad Company in that year acquired from the Harlem Company the right to run its trains over this portion of said railroad, which it has ever since done and is now doing. That by proceedings instituted in 1850 under and in pursuance of and subject to all of the acts, ordinances and agreements relating to the said Fourth avenue, and to the said railroad therein and resulting in an order of confirmation entered in October, 1853, the city of New York assumed to acquire title to the land within the lines of said avenue, from Thirty-eighth street to the Harlem river, subject, nevertheless, to the right of the Harlem Company, its successors and assigns to maintain and operate its said railroad therein conformable to lawful public regulation. That by the act of 1872 as and by way of eliminating grade crossings and otherwise improving the avenue, a prescribed statutory grade of the railroad from Forty-fifth street to the Harlem river was provided and established, and provision made for viaducts and over and under crossings, all whereof was carried out and maintained and used thenceforth, and still is. That in April, 1873, the railroad was leased to the Central Company, which entered thereunder, and is now in sole possession thereof. That on April 19, 1892, the Legislature passed an Act entitled "An Act to regulate, improve and enlarge Park Avenue above 106th Street," etc., known as Chapter 339 of the Laws of 1892, and which act has been duly amended by Chapter 548 of the Laws

of 1894, Chapter 594 of the Laws of 1896, and Chapter 613 of the Laws of 1898.

That under and pursuant to section 13 of the Act of 1892 the board therein designated was appointed and organized and thereupon took entire charge of and proceeded in the execution of the work prescribed by said act, and in that behalf made sundry contracts whereunder all requisite structures, both permanent and temporary, have been and are being constructed under the sole supervision of said board and in part at the expense of the city of New York and thereby the provisions of the said act have been carried out and executed.

That all the said changes that have been made were necessary to carry out the provisions of the said acts and necessary to carry into effect the therein prescribed enlargement and improvement of the avenue.

Also pleaded the statutes of limitations and adverse possession for a period of more than twenty years (pp. 6–13).

Trial.

Upon trial of the issues thus joined plaintiff gave evidence tending to prove his title to the described premises and to the claimed appurtenant easements, and the measure of damage to the usable and fee value of his premises ascribable to the maintenance and use of the railroad structures and train operations; and defendants gave evidence tending to prove the public and private authorities, consents, agreements grants and uses whereunder they claimed the right as against plaintiff to possess and use the previously and then existing railroad structures and maintain operations thereon respectively (pp. 21–69).

History of Avenue and Railroad.

Stated as briefly as may be, the origin and history of the avenue and railroad are as follows:

Chapter 115 of N. Y. Laws of 1807 provided for the making of a map or plan of proposed streets and avenues in the upper or northerly portion of the City of New York and in and by sections 9 to 11 thereof provided for acquirement of title by the City as, from time to time, it might determine to open any or either of such streets or avenues (page 33).

In pursuance of this Act such map or plan of the City was made and filed in April, 1811 (page 63; Defts.' Ex. 1).

By Chapter 263, N. Y. Laws of 1831, The New York and Harlem Railroad Company was incorporated, with authority to build a railroad from Twenty-third Street to the Harlem River, the location thereof not to be final until approved by the Common Council of the City, and not to occupy the ground within any street or avenue as shown upon the map or plan of

the City, whether opened or unopened, unless consented to by the City (page 48).

In August, 1831, the railroad was located with its centre line coincident with the centre line of the Fourth Avenue, then unopened, as shown upon the city map (page 64; Defts.' Ex. 2).

This location thereof was consented to by the city, and that consent and the terms and conditions thereof evidenced by agreement in writing of date January 9, 1832 (page 27).

By their respective deeds of date January 18, 1832, Peter Poillon purported to convey north of the centre line of the old Harlem Road, and Benjamin L. Benson purported to convey south of that line, to The New York and Harlem Railroad Company the centre 24 feet, with the right to occupy with their embankments or excavations the entire width, 100 feet, of the Fourth Avenue, as laid out on the said city map (pages 49-51 and page 65, Defts.' Ex. 3).

By reason of the existence of the railroad in this avenue the city map was changed by Chapter 274, N.Y. Laws of 1837, by adding twenty feet upon either side of the Fourth Avenue (page 48).

By proceedings instituted in 1850 and consummated in or about 1853, the city assumed to acquire title to the ground within the lines of and to open Fourth Avenue from 38th Street to the Harlem River, under and subject unto all of the laws, ordinances, agreements and consents relating thereto, and thus subject to the right of The New York and Harlem Railroad Company to maintain and operate its railroad within the bounds thereof (pages 33, 34, 65).

The railroad at this point was approximately at a level with the general surface of the land, consisted of two tracks, and was thus maintained and operated from in or about 1835 to and until after 1872 (pages 46, 64).

Under authority of Chapter 702, N. Y. Laws of 1872, the railroad was depressed and two additional permanent tracks were laid, the change of grade, and also the relation of the grade of the avenue to the former, and to the newly-established grade of the railroad, being indicated by Defendants' Exhibit 5; and the character of the 1872 structure is indicated by the dotted lines on Defendants' Exhibit 8 (pages 66, 69).

Chapters 339, N. Y. Laws of 1892, and 548, N. Y. Laws of 1894, were put in evidence by plaintiff (page 33) and by defendants (page 48), each without objection by the adverse party.

The change of railroad structure under authority of these Acts was made by the State Board which the Act of 1892 provided for, and the character of that change thereof and the fact that the exterior lines of the present structure are within

the exterior lines of the former structure, are shown by Defendants' Exhibit 8 (opposite page 69), the accuracy whereof is testified to and in nowise disputed, and the reception of the map in evidence not objected to (page 56).

The ground within these lines was, prior to the change under the Act of 1892, devoted to and used for railroad purposes exclusively, and the public had no access across it either directly in front of plaintiff's premises nor at 115th Street, upon which plaintiff's premises corner; the public highway really consisted of two streets, one on each side of the old structure (pages 15, 45, 52). Now, the avenue and 115th Street are open thoroughfares affording free access across every portion thereof (page 52 and black lines on Defts.' Ex. 8, opposite page 69).

DECISION.

Thereafter the trial judge filed his decision "stating concisely the grounds upon which the issues herein are decided," reciting that plaintiff has been since 1888 and is the owner of the described premises, and had and has appurtenant thereto certain easements of light, air and access in and over Park avenue; that the defendant Harlem Company has at all times been and is the owner of the described railroad and railroad structures and the Central Company lessee thereof under lease of date April 1, 1873, for the term of 401 years; that prior to 1872 the railroad was operated upon two tracks laid upon the street surface along the centre thereof; and

"THIRD.—That pursuant to chapter 702 of the Laws of 1872, certain changes were made in said railroad in front of said premises, between the years 1872 and 1878, whereby the number of tracks were increased from two to four; that said tracks were laid along the centre of said avenue, and at the south line of said premises were at the surface of said avenue and at the north line of said premises said tracks were laid in a trench about 5½ feet in depth below the surface of said avenue; that said railroad was bounded on both sides by masonry walls about 3 feet high above the surface of said avenue in front of said premises, cutting off access across said avenue immediately in front of said premises; that said defendant The New York Central and Hudson River Railroad Company in the year 1878 began to operate its trains over said last-mentioned railroad in front of said premises, and continued to maintain and operate said railroad from said year down to February 16, 1897.

FOURTH.—That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March,

1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the centre by solid iron girders each 7 feet and 4 inches high, and is supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

FIFTH.—That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant on February 16th, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

SIXTH.—That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16th, 1897, but that neither of said defendants is liable for such damage.

SEVENTH.—That the said permanent structure and the operation by said defendant The New York Central and Hudson River Railroad Company of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16th, 1897, down to October 10th, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10th,

1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

EIGHTH.—That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

NINTH.—That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally." (pp. 14–16.)

JUDGMENT.

The judgment awarded and entered was: "I.—That the defendants The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, and each of them, and their officers, agents and servants, and all persons claiming under or through them, be enjoined from maintaining or in any way using their permanent elevated railroad structure and its appurtenances in front of the plaintiff's premises, being situated on the northwesterly corner of Park avenue and 115th street, and having a frontage of 76 feet and 10 inches on said avenue and of 26 feet on said street, and be further enjoined to take down and remove the same from in front of said premises; but said injunction shall not be operative for twenty days after service upon defendants' attorneys of notice of entry of judgment herein.

II.—That in case the said defendants shall, at least five days before the said injunction shall become operative, tender for the purpose of execution by the plaintiff and by all other persons having any title to, interest in or lien upon the said premises, a form of conveyance and release to said defendants of the plaintiff's easements of light, air and access appurtenant to said premises, taken by the maintenance and use of defendants' said permanent elevated railroad structure, as the same is now maintained and used; and in case the plaintiff and all other persons having any title to, interest in or lien upon the said premises, shall execute such conveyance and release, and

shall tender delivery thereof to the said defendants; and in case the said defendants shall thereafter pay or tender to the plaintiff's attorneys the sum of three thousand dollars ($3,000) with interest thereon from October 10th, 1900, then the said injunction shall not in any manner become operative; and in case the plaintiff fails to deliver or tender for delivery said conveyance and release, executed as aforesaid, the said injunction shall not in any manner become operative." (pp. 18–19.)

Judgments in Appellate Courts.

That judgment was in all things affirmed by the Supreme Court, Appellate Division, and both parties appealed therefrom to the Court of Appeals.

The latter court ordered and adjudged reversal of the judgment and dismissal of the plaintiff's complaint on the merits and remitted the case to the Supreme Court, wherein judgment was entered accordingly on the said remittitur.

Alleged Unconstitutionality

The particulars wherein plaintiff claims that Chapter 339 of New York Laws of 1892, is violative of the Constitution of the United States are that thereby

1. Plaintiff is deprived of his property without due process of law.

2. That the obligations of contracts are impaired. Remittitur (pp. 1 and 2).

Or, as is more fully set forth in the order to amend the remittitur (pp. 77, 78):

"(1) That chapter 339 of the New York Laws of 1892, and the acts amendatory thereof, violate section 1 of article XIV of the amendments to the United States Constitution, in that the said acts deprive the plaintiff of property without due process of law, which said property consists of rights and easements of light, air and access in and over Park (or Fourth) avenue in the city of New York, the said rights and easements being appurtenant to the plaintiff's premises abutting on said avenue.

(2) That chapter 339 of the New York Laws of 1892, and the acts amendatory thereof, violate section 10 of article 1 of the United States Constitution, in the respect that the said acts impair the obligation of a contract, to wit, the contract under which Park (or Fourth) avenue in the city of New York was dedicated as a public street in and by the deed of Peter Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24, 1827; and in the further respect that the said acts impair the

obligation of the contract existing among the parties to this action, and arising from the fact that the said parties all claim title under said Poillon through conveyances which recognize the character of said avenue as a public street, and which refer to public maps whereon said avenue is so represented."

To what these have Relation.

Consideration thereof involves cognizance of:

First.—The nature, character, status and condition of the supposed property and property rights, the subject of the action, to which the enactment in question is deemed to apply and pertain.

Second.—The nature, character and effect of the rules of law embodied in the enactment.

Third.—Whether in any, and if any what respect or particular, the provisions of the enactment as applied and administered in the case in hand have operated to or had effect to deny to plaintiff, or deprive him of due process of law, or remedy, either in respect of property appropriated, or in respect to contract obligation contravened.

Paragraph "Ninth" of the above decision is in all essentials identical with the finding upon the same subject in the *Fries* case, concerning which the Court of Appeals by O'Brien, *J.* (169 N. Y., 270), at page 278, said:

"On the 15th of February, 1897, it is found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the State had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the State compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the State in the exercise of its supreme authority. The conclusion of the learned trial Judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.

The elevated railroad cases in this Court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as

against the plaintiff to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no application in this case, and so this Court has held (Conabeer *vs.* N. Y. C. & H. R. R.R. Co., 156 N. Y., 474)."

The gist of the matter ruled upon as above, and followed in this case, is stated in the majority opinion herein, rendered by PARKER, *Ch. J.*, as follows:

"Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was, briefly, that the state, setting about making improvements in Fourth avenue which were to benefit the general public, found defendant in possession of four tracks in the middle of the avenue, with the right to operate its trains upon them, which it was enjoying. The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct over the part of the street formerly occupied by the subway and compelled it to stop running its trains in the subway and to run them on the viaduct instead. The state had the power to do these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built.

"The plaintiff was injured by the change, as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the state, which had the power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the state.

"When the question was again presented, therefore, as it was in the *Fries case* (*supra*), we attempted to cure the error which we concluded we had made in the *Lewis* case. The opinions in the *Fries* case were written by Judge O'BRIEN and Judge MARTIN. In the course of Judge O'BRIEN'S opinion it is said:

"'I am unable to perceive any reason why the legislature

had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement, for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria.*'

"Judge MARTIN states the principle as follows: 'It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in accordance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill, and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensation than the benefit he derives from the social compact.

"The judgment was accordingly reversed. That decision was deliberately and carefully made, and reflected the view of a majority of the members of this court at that time, and still does" (printed record, pp. 92, 93).

POINT I.

The jurisdiction invoked, the hearing had, the determination thereon, and resultant adjudication, all had relation to and involved solely the application of the rules and the principles of local property law in force prior to the 1892 enactment, and remaining in force unaffected thereby, to the status of property right which had resulted from the grants express or implied antedating that enactment.

Character of Abutters' Easements.

The contributions of the courts of the State of New York to the judicial history of abutters' easements in urban public highways, serve to emphasize rather than to derogate from the proposition that such easements are the creation of, and their existence, character and scope, and the limitations to which they are subject, are to be determined by those statutes and rules of the state or local body politic within and by whose jurisdiction the highway was created, and with especial reference to any and all statutes, conditions and circumstances whereby the particular highway, easements in which are in question, is in any wise constituted an exception to the ordinary, and in such wise and measure subject unto somewhat peculiar rules and measures of public and private right and relative property right.

Upon this subject, Peckham, *J.*, writing for the Court of Appeals, said:

> "The easements of abutting owners in New York city, who are without title to any portion of the streets upon which their lands abut, differ somewhat in their origin from ordinary easements. They have not been created by grant or covenant, but it is said of them that it is easier to realize their existence than to trace their origin; that they arise from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street, and shall not be devoted to other and inconsistent uses."
>
> *White* vs. *M. R. Co.* et al., 139 N. Y., 19, 25.

That is to say, ascertainment and determination as to what trust was created by, and what public pledges and what im-

plied contracts, originated in and attended the opening of the particular street, easements wherein are in question, are to be had and reached by resort to the situation, the course of legislation, the statutes under which the street was opened as a public thoroughfare, and all of the circumstances giving character to the proceedings thereunder, together with the history of the street, and easements therein, from the opening thereof to the installation of that the rightfulness whereof is the subject of dispute; and in the light of all this the status and character of the street, and of abutters' easements therein, are to be ascertained, and therefrom may be determined whether in and by installation therein of the thing complained of, the street has been "diverted to other and inconsistent uses," and existing easement rights trespassed upon.

From this it follows that the mere fact of creation and existence of an urban public highway does not *per se* produce in every instance the one specific cut or pattern of abutter's easement.

The street opening proceeding is the method or process of creating rather than the creative source of the easement.

By that method or process the public authority addresses itself to the situation which it finds existing, deals with that situation under authority of the general course or body of legislation relating to such exercise of power, executes and carries into effect the trusts created by adaptation thereto of all the statutory provisions under authority whereof the particular public open street is brought into existence; and thus creates the street for and subject unto such uses and purposes, and vests abutters' easements therein of such scope, extent, quality and character as the peculiar circumstances of the property and proceeding indicate and imply.

After Creation may be Limited or Modified.

Moreover it is also obvious that abutters' easements which at their inception are wholly or measurably similar in scope, extent or quality, may in these respects become or be rendered dissimilar by subsequent acts and conduct of public authorities and property owners, or by acts and conduct of either acquiesced in by the other.

In so far as plaintiff's easements of light, air and access over the one-hundred-foot planned avenue were created and brought into existence by the grants and acts of Poillon and of his immediate or remote grantee, those easements were like any other property subject unto the operation of rules of law pertaining to and governing the rights of eminent domain, private grant, express or implied, abandonment, surrender and adverse user, and all such rights as any of these might originate or evidence.

The Harlem Company was by Section 8 of its charter specifically authorized to take title in fee to all lands requisite for its road.

That under the law of the State of New York a railroad company, though chartered for a term of years, may take a perpetual easement in, or title in fee to, lands necessary for its use, was expressly decided by the Court of Appeals in *People* v. *O'Brien*, 111 N. Y., 1, and *Miner* v. *Railroad Co.*, 123 N. Y., 242. In reference to the doctrine of these cases Mr. Justice Peckham, writing for this Court in *Detroit* v. *St. Ry. Co.* (184 U. S., 368), at page 395, said:

> "It is not a new one, and the decisions have all been one way, in favor of the right of a corporation, limited as to the time of its corporate existence, to purchase or acquire by agreement or condemnation property for its use, the title to which it might own in fee."

The *Miner* case, is also authority in support of the proposition, that under the law of New York, such railroad company may successfully stand upon twenty years' adverse possession as a bar to recovery in respect to such land. Upon that subject Earl, *J.*, (Id, p. 251) said:

> "From 1850 to the commencement of this action, more than thirty years, this land was held and possessed under a claim of right, adversely, by the defendant, and its predecessors in title. During the first twenty years of that time, unless a perpetual easement for railroad purposes was originally taken, the possession was wrongful and the owners of the fee could have re-entered or brought ejectment. That under such circumstances the action is barred by adverse possession is free from doubt."

Snell v. *Leavitt* (110 N. Y., 595), involved title to an easement. The Court of Appeals by Earl, *J.*, at page 602, said:

> "It could be lost by adverse user or possession by the owner of the servient tenement, and the easement could be lost and extinguished by abandonment in some of the modes or by some of the means recognized in the law. Non-user for the period of twenty years, under such circumstances as show an intention to abandon and give up the easement, is sufficient to extinguish it."

That case was cited and followed in *Woodruff* v. *Paddock* (130 N. Y., 618), involving title to an easement in an alley, which had been opened to and used by the public more than twenty years, and subsequently kept closed for an equal period. The Court of Appeals, by Follett, *Ch. J.*, at page 624, said:

> "It is settled that under the Statute of Limitations of this State the legal title to land may be lost by its true

owner, and be acquired by one holding it adversely for twenty years (*Baker* v. *Oakwood*, 123 N. Y., 16).

"So an easement may be lost by adverse possession if the owner or possessor of the servient estate claims to own it free from the private right of another, and excludes the owner of the easement, who acquiesces in the exclusion for twenty years."

Consequent upon some one or more of these happenings or exigencies, among others the grant of Poillon to it, the railroad company in or about 1835 entered into possession of the strip of land having as its center line the center line of this planned and proposed but then unopened avenue, built its two track railroad thereon, and thenceforth maintained and operated it thereon.

The railroad grade thus established was not conformable to or coincident with the grade of the avenue, because no avenue, and hence no avenue grade, was in existence. That the railroad grade did not, and as a practical railroad grade could not, even approximately, conform to the natural surface of the ground, appears by the map and profile of original location of the railroad, a copy of this portion whereof is produced (Defendants' Exhibit 2, page 64).

That the grade of the railroad and that of the subsequently opened avenue were not coincident is shown by the map and profile of "present grade" of the railroad, the "established grade" thereof as prescribed by the Act of 1872, and of the "avenue grade," a copy of this portion or section whereof is produced (Defendants' Exhibit 5, page 66).

Status at Date of Avenue Opening.

The situation to which the avenue opening proceeding was addressed, and with which it dealt, was that Poillon, the common source of title of all parties hereto, had granted to the city in trust for street purposes the one hundred feet width of the originally mapped avenue, and, to plaintiff's predecessors in title and others, the land abutting the avenue, and had subsequently purported to convey to the railroad company the middle twenty-four feet of the mapped avenue with the power of sloping embankments and excavations the full width of the avenue; the city had approved the location of and consented and agreed to the building of the railroad as located, the railroad had been thus built and put in operation, and the Legislature had altered the city map by adding twenty feet width on either side of this avenue; thereupon by that proceeding the city assumed to acquire from respective owners thereof the twenty-foot added strips of land, and from the railroad company for nominal consideration the fee of the center twenty-four-foot strip; and as to the thirty eight feet width either

side of the twenty-four foot strip, the city rested upon the title "ceded" by the said deed of Poillon to the Mayor, etc. (see map Exhibit 3, opposite page 65).

AVENUE OPENING, HOW RAILROAD AFFECTED THEREBY.

The avenue opening proceeding found the railroad and its operations existing facts, the rightfulness whereof was not therein questioned by abutting owners. The railroad company was awarded one dollar per block or twenty dollars per mile for the naked legal title to the land constituting its road bed, but nothing for, because not purporting to take from it, the right to there maintain and operate its railroad. The street was opened each side of, but not upon or over the ground occupied by the railroad.

The effect of that proceeding upon property rights, occupancy and uses existing prior to and at the initiation of the proceeding is to be ascertained from a view of the proceeding itself, as exhibited by the record thereof, in the light of the status of property right, occupancy and use, and all other circumstances with which the proceeding dealt, and in the light of all the statutes, ordinances, consents, agreements and grants whereby that status was created and whereunder the proceeding was had, and also in the light of the interpretation, force and effect imputed to the proceeding by the acts, conduct and acquiescence of State and municipal authorities and parties in interest at the date of the proceeding, and thenceforth to and until the doing of the acts constituting the supposed trespasses herein complained of.

ADDED NOTHING TO ABUTTERS' EASEMENTS.

Quite obviously this character of proceeding did not bring to or vest in the abutting owners any additional easements in the original one hundred feet width of the avenue, and that it did not was adjudged in the *Conabeer* case, *infra*.

That as matter of rule of property law such taking of the naked legal title of the railroad ground, in so far as, if at all, that ground was thereby impressed as potentially a part of the public street, served to vest in the State the right and power of prescribing and enforcing reasonable regulation of the place where and manner in which the railroad should be maintained and operated, as and by way of promoting the usefulness of the street for public travel therein, was adjudged in *Albany* v. *Railroad Co.*, 108 N. Y., 14, affirming 45 Hun, 442. The public right being to regulate, but not to terminate or exclude railroad occupancy and use, abutters' easements were of necessity of naturally consequent limited and qualified character.

It needs not to dispute that the deed of 1827 of Poillon to the Mayor of the land within the avenue in trust for street purposes was a potential dedication for a street unincumbered by a railroad. In 1850, by the proceeding to open the 140-foot avenue, the city gave its first token of its acceptance of the Poillon dedication.

As that proceeding did not purport to provide or contemplate ouster of the railroad, that exigency afforded notice and opportunity to the then abutting owners, plaintiff's predecessors in title, to assert that whereas by the 1827 Poillon deed this land was dedicated for street purposes free of railroad uses, therefore the city might not lawfully accept such dedication as, or change the subject matter of the dedication to, a street incumbered by a railroad, with the right, power and burden of public servitude and public regulation suitable to such respective or joint occupancy and use.

What the city did, and those abutting owners, plaintiff's predecessors in title, acquiesced in, was, it treated the subsequent grant by Poillon to the railroad company, the railroad company's possession, and abutter's acquiescence, as evidencing meantime *pro tanto* diminution of the subject matter of the dedication, and accepted it as thus diminished. If and so far as there has been impairment of the obligation of the grant of Poillon to the Mayor, or of the obligation, if any, growing out of the railroad taking title to land described as a part of the mapped and planned avenue, they were impaired in and by the then existence of the railroad, and the city's first acts signifying acceptance of the dedication as and for a railroad street, all with the acquiescence of the then abutting owners, including plaintiff's predecessors in title.

Whether by means thereof, and subsequent acquiescence therein until 1897, they lost the right to assert and rely upon the obligations of these respective contracts is not a Federal question. *Eustis* v. *Bolles*, 150 U. S., 361; *Pierce* v. *Railway Co.*, 171 U. S., 641; *Moran* v. *Horsky*, 178 U. S., 205.

The status continued after, as it had been before the avenue opening, as regarded the relations between the railroad company and the owners of land abutting the avenue, that the railroad possession, occupancy, maintenance and operation had every characteristic of exclusion therefrom of all other persons, rights, interests and uses, identical with that of a right of way owned in fee by the railroad company (see par. third, page 15).

What 1872 Enactment Dealt With.

The 1872 enactment found and dealt with the avenue and railroad, with its public street grade crossings, and for the elimination thereof and otherwise improvement of the avenue for public travel and safety therein, prescribed the regulation

of avenue and railroad, which regulation was carried into effect, and thereunder was created the status which existed thenceforth until the carrying into effect of the enactment of 1892.

Status Dealt with by 1892 Enactment.

At the time of the 1892 enactment, the avenue, and the exclusive occupancy and use of land by and for the railroad within the bounds thereof, were existing facts, and owners of land abutting the avenue had no property right whereupon they might prevent continuance of the railroad maintenance and operation. (Trial Judge's decision par. Third and Ninth, pp. 15, 16.)

What the State Assumed to Do.

As and by way of regulation thereof the state assumed to exercise the right and power to provide for the enlargement and improvement of the street by including therein, and extending the usable surface thereof over, the sixty-foot strip theretofore and thereunto occupied and used exclusively for railroad purposes, by provision and regulation which did not bring the railroad structure and operations either upon plaintiff's premises or upon the previously existing open street, upon which plaintiff's premises abutted.

These respective 1872 and 1892 enactments did not have to do with relations or status created by the deed of Poillon to the Mayor, etc., of the land within the mapped and planned one hundred foot avenue in trust for street purposes, the filing of maps of allotment conformable to the said city plan, and conveyance of lots abutting the avenue to plaintiff's predecessors in title; but each in turn had to do with and dealt with the status and conditions existing at the date of the respective enactment.

Scope of Adjudications.

The state courts in determining and adjudging the force and effect of and validity of the Act of 1872 and Act of 1892, respectively, were not called upon to and did not determine or adjudge the force, effect and validity of those respective enactments with reference to status or conditions existing in 1827, the date of the said Poillon deeds to the Mayor, etc., and to plaintiff's predecessors in title, or in 1831 and 1832, the dates of location of, and public and private agreements and grants to and for the building, maintenance and operation of the railroad, or in 1850 to 1853, the date of the street opening proceeding. They did determine and adjudge the effect and validity thereof with reference to the status and conditions of public and private right and relative property right existing and in effect at the dates of the respective enactment, the force

and effect and validity whereof constituted the subject matter of adjudication, and of the alleged trespass.

What Plaintiff's Contention Assumes.

Plaintiff's contention for affirmance of the judgment of the Trial Court, whereby for the compensation named plaintiff was to grant and defendants acquire the property rights in question, presupposes that his property, if taken at all, has been taken for a purpose for which it was subject to be taken upon making compensation therefor.

Plaintiff's Case is a Virtual Condemnation Proceeding.

It is not and cannot be disputed that defendant Harlem Company was and is possessed of the right of eminent domain whereby to acquire property necessary to the lawful maintenance and operation of this railroad. Plaintiff's complaint setting forth the facts therein alleged and asking damages in respect of past maintenance thereof, and injunction or compensation in respect of its future maintenance, and prosecution of that complaint to final judgment, constituted in every respect the legal equivalent of a condemnation proceeding.

American Bank Note Co. vs. *N. Y. E. R.R. Co.*, 129 N. Y., 252.

Bohm vs. *M. E. R. Co.*, 129 N. Y., 576.

Sperb vs. *M. E. R. Co.*, 137 N. Y., 155.

That principle is well and tersely stated in the *Bank Note Company* case, as follows:

> "There is no doubt in this case, and I think no doubt in any case, that the injunction of a court of equity and its alternative damages are to be deemed a substitute for the ordinary proceeding for condemnation, with the practical difference only that in the one case the company is the moving party and in the other the owner." * * * There is no difficulty in assuming that the alternative damages are awarded to the same extent and for the same elements as the compensation given in a special proceeding for the condemnation of land under the law of eminent domain. Such a process in each case ends in the same substantial redress. The form is different but the result is identical. It follows, therefore, that the alternative damages of equity must be such and only such as would be given in a proceeding for the condemnation of lands for a railroad use, due regard being had to the different characteristics of the property to be taken. We must, as a consequence, recur to the legal rules which have been established in such cases.
>
> They have their foundation in the constitutional pro-

vision that private property shall not be taken for public use without just compensation, and in the terms of the General Railroad Act formulating the mode of procedure" (129 N. Y., 270).

And again, by Hon. Peckham, *J.*, in *Bohm* vs. *M. E. R. Co.* (129 N. Y., 576):

"Although these are suits in equity, commenced to obtain equitable relief and to prevent the defendants from operating their road unless they pay the plaintiffs the damages they will sustain from the permanent interference by the railroad with their easements of light, air and access, yet the rules upon which such damages are to be awarded are so far well settled as to enable us to say that those damages are only such as would be given in a proceeding for the condemnation of lands for a railroad use, regard being had to the different characteristics of the property to be taken in these cases (p. 584, 585). * * * There is no question made but that the defendants are liable to pay the full value of any property taken by them subject to no deduction whatever. How the value of the particular kind of property which is here taken shall be arrived at is the main, and indeed the only, question in these cases" (pp. 585, 586). * * *

"It seems to me plain, from this review of the law, that the real injury (if any) suffered by the land owner in any particular case, lies in the effect produced upon his abutting land by the wrongful interference of defendants with these easements of light, air and access to such land. And where they are interfered with, and in legal effect taken to any extent, it is not possible to think of them as of any value in and of themselves separated from the adjoining land, but their value is to be measured by the injury which such taking inflicts upon the land which is left, and to which they were appurtenant" (p. 588).

"The so-called Rapid Transit Acts under which the defendants were organized, provided that the commissioners of appraisal should not, in determining the amount of compensation, make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad. The case of *Newman* decides that this provision does not mean that in examining the question whether injury has resulted to the abutting owner's remaining land by reason of the taking of a portion of the easements spoken of, the court cannot regard the fact that so far from injury, the land remaining had been specially enhanced in value by reason of the taking. On the con-

trary, it decides that such fact, of special enhancement in value, is material and may and must be considered upon the question of damage. It is not offsetting injury against benefits. It is discovering whether in reality there has been any injury to the remaining land. To prove that the land has been specially benefited may be proof that it has not been diminished in value. If it would have increased still more in value but for this taking by the road, that difference it must pay, because to that extent there would be damage. The *Newman* case is authority for the proposition that the easements are only of nominal value in and of themselves, and that the result of taking them must be looked for in the effect upon the adjoining land. If, instead of loss or injury that land has been specially benefited by the taking by the railroad company, then no damage has been sustained by the land owner" (p. 591).

Also in *Sperb* v. *M. E. R. Co.*, (137 N. Y., 155):

"The principle which should guide an award of damages to be paid by the railroad company in order to obviate the injunction, is the same as in proceedings under the statute to condemn property for the railroad use. The injunction of the court and the alternative damages are deemed to be a substitute for those proceedings. In computing the alternative damages, their extent and the elements should be the same as would be considered in the computation of the compensation to be given in proceedings for the condemnation of lands for a railroad use; due regard being had to the different characteristics of the property to be taken" (pp. 161, 162).

CASE STOOD UPON LAW ANTEDATING 1892 ENACTMENT.

If plaintiff was entitled to recovery of compensation for property taken or for contract broken, the Act of 1892 presented no barrier to his recovery, and it was not necessary to such recovery that the Act contain provision therefor; and therefore lack of such provision could not render it unconstitutional as constituting the taking of property without due process of law.

Reining v. *Railroad Co.*, (128 N. Y., 157).
Egerer v. *Railroad Co.*, (130 N. Y., 108).

In *Reining* v. *N. Y., L. & W. R. Co.*, (128 N. Y., 157), the trial court awarded and the Court of Appeals affirmed damages in favor of the abutting owner in respect of a railroad embankment in the street.

The street was sixty-six feet wide, the embankment twenty-four feet wide and five feet nine inches high, supported on

either side by perpendicular stone walls. The sidewalk was fourteen feet wide and the driveway between the sidewalk and the embankment insufficient for teams to pass or turn without difficulty.

The street was originally opened in the right of the ordinary public street easements, the fee of the soil being of individual ownership. Subsequently the city acquired the fee upon nominal consideration, and thereafter, in pursuance of charter authority so to do, gave its consent to the building and operation of the railroad in the street, and for this purpose to build and maintain the embankment complained of.

This case was distinguished from the *Fobes* case (121 N. Y., 505), in that public travel was practically excluded from the railroad ground. Its similarity to the *Story* case (90 N. Y., 122) was pointed out, and with reference to application of the principle of that case it was said, (p. 165):

> "It is enough if such part of the street is practically and substantially closed against them for ordinary street uses."

And, further on in the opinion (p. 170):

> "Here the plaintiff as we hold has a common law remedy for his injury."

In *Egerer* v. *N. Y. C. & H. R. R. R. Co.* (130 N. Y. 108), the action was for damages occasioned by construction of the elevated railroad in such wise as deprived plaintiff's abutting premises of light, air and access.

This elevated railroad structure was constructed by the railroad company in pursuance of and in conformity with an agreement between it and commissioners thereunto appointed and empowered by an Act of the Legislature.

> "The railroad company has laid its track upon this street with the consent of the City of Rochester, and by virtue of its right under condemnation proceedings. The right it acquired under the latter proceeding was the right to use this street to lay its track and run its cars, subject to the older and superior rights of the general public to use the street and, as we have seen, subject to the rights of the abutters to access, air and light." (p. 115.)
>
> *Held.* "We think the direction of a verdict for the defendant was error, and that the question of plaintiff's damages should have been submitted to the jury." (p. 116.)

ADEQUATE REMEDY AVAILABLE IF TRESPASS PROVEN.

In the *Reining* and *Egerer* cases the elevated railroad occupied ground which it was the right of the abutter to have devoted to public highway uses with thereunto incident ease-

ments of access, air and light. The damage thus occasioned was adjudged actionable and the remedies commonly available were applied and administered. In the case at bar the same remedies are recognized as available. Denial of right of recovery is not based upon absence or inavailability of suitable remedy, but upon the fact that the ground occupied by the railroad is that which had theretofore, as against plaintiff, been rightfully devoted to exclusive railroad occupancy and uses.

Railroad not Alleged to be a Public Nuisance.

If the basis of plaintiff's complaint and demand of relief herein had been that the former subway structure, or the present viaduct structure, and use of either, constituted a public nuisance occasioning him special injury and damage, it might have been competent for him in support of *such* contention to claim that the 1872 and 1892 enactments, respectively, were invalid in that the provisions thereof were not within the legislative right and power of reasonable police regulation. *Davis* v. *Mayor*, 14 N. Y. 506; *Hussner* v. *Railroad Co.*, 114 N. Y. 433.

Plaintiff, however, having specifically waived that basis of contention, and upon the other hand invoked and obtained hearing and adjudication upon the hypothesis that as regards the general public, each of the said railroad structures and the use thereof were lawful, and the railroad company lawfully entitled to appropriate whatsoever private property or private property right, if any it lacked, requisite to such maintenance and use thereof, it would not be consonant therewith for plaintiff now to contend that either the 1872 or 1892 enactment is invalid, in that it is an excess of or abuse of exercise of the legislative right and power of reasonable police regulation, as in either such respect an impairment of contract obligation or wanting the character of due process of law.

Character of 1872 and 1892 Enactments.

If the enactments as applied, administered and adjudged upon in this action, each in turn consist of mere police regulation, and do not in any wise operate to appropriate private property or private right to public use without compensation, but leave those properties and rights, the subject matter of the regulation, subject unto the governance of previously existing rules of law suited to administration and adjudication thereof and thereon as the right thereof shall appear, then and in such event, whatever, if any, failure of justice or right shall have resulted has not been occasioned by invalidity of or infirmity in the enactment, either by way of impairment of contract ob-

ligation or deprivation of property without compensation or without due process of law.

Without statement in detail of the provisions of the act of 1892, it is sufficient to say that it provides for the enlargement and improvement of the avenue and improvement of intersecting streets by means of prescribed change of grade of the railroad, the carrying of railroad bed and tracks upon a steel viaduct of such height and form as, with prescribed changes of avenue and street grade, will afford suitable clearance for highway travel, and that upon its completion railway operations shall be conducted thereon; and provides for removal of existing railroad structures and parapet walls, filling of cut and paving of surface like unto the then used portions of the avenue; it in no wise mentions or suggests the taking of private property, nor the existing provisions of law under which remedy is administered and compensation awarded and adjudged in favor of those whose property is taken for public use.

Plaintiff not Defeated by Lack of Remedial Law or Process.

Moreover, the ground upon which plaintiff was denied recovery and his complaint dismissed was not at all that there was any lack of adequate remedial process at his command for redress of any grievance provable or proven under his complaint, but solely upon the ground that upon all of the proofs presented no actionable grievance was established.

Plaintiff's proofs, the trial court's findings, and the consideration and judgment of each of the state courts followed the hypothesis of plaintiff's complaint in that neither thereof was in any wise addressed to consideration of the railroad structures or train operation as constituting a public nuisance because not in pursuance of or conformity with lawful authority, but solely to consideration of whether and the extent to which such maintenance and operations exceeded the property right which plaintiff or his predecessors in title had released, and invaded that to which plaintiff was still entitled.

In and by thus pleading, presenting and submitting his suit, plaintiff clearly and specifically invoked that jurisdiction of the court under which upon demand of relief by way of alternative compensation or injunction, the court is empowered to ascertain, determine and adjudge the fact of trespass, the extent thereof, the measure of compensation mete for permanent appropriation of property right of scope equal with the ascertained trespass, and to adjudge injunction consequent upon default of payment of such compensation.

Plaintiff did not invoke, and the courts did not in any wise or degree exercise, the jurisdiction to hear and determine that the complained of railroad structures and operations were or

were not a public nuisance as being without authority of valid law, and hence the proper subject of injunction absolute, and therefore not the subject of rightful continuance upon acquirement of and payment for private property, if any, thereby appropriated.

Character of Adjudication Herein.

Thus it is obvious that in so far as in this action the state *court was called upon to and did* consider and adjudge the constitutionality of the act of 1892, such consideration and adjudication had naught to do with the question of the power of the legislature to prescribe and enforce the therein provided change of regulation of the manner of maintenance and use of street and railroad, respectively, because the theory upon which the action was presented, submitted and determined was that the structure and use were lawful in every particular save that as against plaintiff they constituted a private trespass, to be redressed, not by abatement, but by suitable compensation upon the basis of permanency of maintenance and use thereof.

Thus the case cannot be deemed to present for judicial cognizance the question whether by means of, or by reason of, vested right or contract obligation asserted and relied upon by plaintiff or otherwise, the State had parted with or did not possess the legislative power to prescribe and carry into effect this public improvement.

The scope of judicial cognizance regarding the constitutionality of the enactments involved is therefore limited to inquiry regarding the operation, force and effect of their provisions in and by way of denying to plaintiff or depriving him of the due process and remedy customarily available in the exigency of a legally authorized and executed public improvement, concerning which plaintiff asserts and defendant denies that property vested in plaintiff has been thereby taken, or a status vouchsafed to him by contract obligation has been thereby overthrown.

Legislation and Judicial Decision to which this Review Pertains.

By way of affording ready reference to the legislation pertaining specifically to the matters in dispute herein, and to the judicial announcements entitled to most important regard herein, without rendering the brief unnecessarily cumbersome, an accompanying supplement contains copies of the several enactments, and of the opinions rendered in the Supreme Court, Special Term, in *People* ex rel. *N. Y. & Harlem R.R. Co.* vs. *Havemeyer*; in the Supreme Court, General Term, in *Tocci* vs. *Mayor*, and in the Court of Appeals in others of the cases.

Park Avenue Improvement Cases.

The following is a substantially complete list of the reported cases relating to the 1872 and 1892 railroad structures in Park Avenue; the last column refers to pages of the supplement to this brief:

Birrell *vs.* R.R. Co., 41 App. Div., 506; 60 App. Div., 630; 173 N. Y., 644.
Caldwell *vs.* R.R. Co., 84 App. Div., 637.
Campbell *vs.* R.R. Co., 35 Misc., 497; 84 App. Div., 637.
Conabeer *vs.* R.R. Co., 84 Hun, 34; 156 N. Y., 474. 60
Dolan *vs.* R.R. Co., 74 App. Div., 434; 175 N.Y., 367. 111
Ehret *vs.* R.R. Co., 74 App. Div., 628; 175 N.Y., 503.
Fries *vs.* R.R. Co., 57 App. Div., 577; 169 N.Y., 270. 85
Henry *vs.* R.R. Co., 84 App. Div., 637.
Keirns *vs.* R.R. Co., 60 App. Div., 630; 173 N.Y., 642. 109
Ketcham *vs.* R.R. Co., 76 App. Div.,619; 177 N.Y.,247. 113
Kriete *vs.* R.R. Co., 67 App. Div., 620; 175 N. Y., 484. 110
Larney *vs.* R.R. Co., 62 App. Div., 311.
Lewis *vs.* R.R. Co., 25 Misc., 13; 40 App. Div., 343; 162 N. Y., 202. 71
McCarthy *vs.* R.R. Co, 74 App. Div., 629; 175 N. Y., 504.
Mt. Morris Bank *vs.* R.R. Co., 84 App. Div., 637.
Muhlker *vs.* R.R. Co., 60 App. Div., 621; 173 N.Y.,549. 97
Niewenhous *vs.* R.R. Co., 76 App. Div., 619; 177 N.Y., 566.
O'Neil *vs.* R.R. Co., 67 App. Div., 620; 175 N. Y., 484.
Pape *vs.* R.R. Co., 74 App. Div., 175; 175 N. Y., 504.
People *ex rel.* R.R. Co. *vs.* Havemeyer, 47 How. Pr., 494. 34
Sander *vs.* R.R. Co., 42 App. Div., 618.
Sander *vs.* R.R. Co., 58 App. Div., 622.
Scholz *vs.* R.R. Co., 67 App. Div., 620; 175 N. Y., 485.
Siegel *vs.* R.R. Co., 62 App. Div., 290; 173 N. Y., 644.
Tocci *vs.* Mayor, 73 Hun, 46. 51
Talbot *vs.* R.R. Co., 78 Hun, 473; 151 N. Y., 155. 56
Taylor *vs.* R.R. Co., 27 App. Div., 190.
Tynberg *vs.* R.R. Co., 84 App. Div., 637.
Welde *vs.* R.R. Co., 28 App. Div., 379.
Welde *vs.* R.R. Co., 29 Misc., 13; 53 App. Div., 637; 168 N. Y., 597. 80

In People ex rel. N. Y. & H. R. Co. v. *Havemeyer*, the validity of the 1872 enactment was attacked, as and by way of defense against mandamus to compel payment thereunder, the attack adjudged ill-founded, and the validity of the enactment sustained in a judgment rendered by the N. Y. Supreme Court in 1874.

Tocci vs. *Mayor* (73 Hun, 46), was a taxpayer's action to enjoin payment by the city officials in respect of the 1892 structure, the allegation being that the act was unconstitutional, in various respects, and this was adjudged untenable.

The right of the railroad company to maintain and use the railroad structure created and maintained under the 1872 enactment, without being answerable in damages to owners of premises abutting the avenue and street occupied thereby, was called in question and adjudged in favor of the railroad company in *Talbot* v. *Railroad Co.* in trial court December Term, 1893, affirmed by General Term, May Term, 1894 (78 Hun, 473), and affirmed by the Court of Appeals December, 1896 (151 N. Y. 155); and in *Conabeer* v. *Railroad Co.*, in trial court, December, 1893, affirmed by General Term, January, 1895 (84 Hun, 34), and affirmed by the Court of Appeals October, 1898 (156 N. Y. 474).

In like manner the trial court adjudged and the respective reviewing courts of the state have affirmed in this case, as above set forth, that the maintenance and operation of the railroad as existing and in use at the time of the 1892 enactment was rightful as against this plaintiff, and he disentitled to complain thereof or have compensation or damages in respect thereof.

Basis of Judicial Decision.

Comparison of the *Talbot* case (151 N. Y., 155); *Conabeer* case (156 N. Y., 474); *Lewis* case (162 N. Y., 202); *Fries* case (169 N. Y., 270), and the *Muhlker* case (173 N. Y., 549, and this record, pp. 90–100), shows that the different conclusion in the latter cases from that of the *Lewis* case, did not at all result from change of view as to the validity, force or effect of the 1892 enactment, but from reconsideration and rejection of the former view regarding the measure of property right previously parted with by plaintiff and his predecessors in title, and consequent difference in measure and degree to which plaintiff's property rights were subordinate and subject unto public servitude and public regulation in the manner prescribed and provided by the 1892 enactment.

In the *Lewis* case all of the courts held that certain of plaintiff's property had been taken, and adjudged the railroad company liable in the sum of the net increase of injury occasioned by maintenance and use of the 1892 structure over and in excess of that occasioned by the maintenance and use of the 1872 structure.

The Supreme Court, Special Term, and Appellate Division in the *Caldwell*, *Campbell*, *Fries*, *Keirns*, *Kriete*, *Muhlker*, *Niewenhous*, *O'Neil*, *Scholz*, *Siegel* and *Tynberg* cases, adjudged the railroad company liable upon the principle and in

the measure adjudged in the *Lewis* case as above stated; and, in the *Birrell*, *Henry*, *Larney* and *Sander* cases, adjudged the railroad company entitled to maintain and use the two middle tracks at their present grade, and hence liable in the sum of the net increase of injury occasioned by change of the two outermost tracks.

The Court of Appeals in the *Birrell*, *Fries*, *Keirns*, *Kriete*, *Muhlker*, *Niewenhous*, *O'Neil*, *Scholz* and *Siegel* cases, held that none of plaintiff's property had been taken, and adjudged the railroad company not liable in respect of damages occasioned by the 1892 structure and use thereof.

The *Dolan*, *Ehret*, *Ketcham*, *Mt. Morris Bank*, *Pape* and *Welde* cases are in respect of properties opposite that part of the 1892 structure which, to accommodate the station, is of greater width than the 1872 structure was, and in each of these the Court of Appeals reversed the judgment of the lower courts and remanded the cases for trial with reference to such damage as is occasioned by so much of the railroad structure and use as is outside of the lines of the 1872 structure, and as shall be found to be in excess of the railroad right granted by the predecessors in title of or by those complainants.

The features deemed and held to distinguish the cases in reference to properties opposite this greater width railroad structure and operations were (1) that the railroad company's titles, of nature and scope adequate to justify the present railroad structure wholly within the exterior lateral lines of the former structure and operations, as in the case at bar, were not necessarily applicable to or justification of so much of the new structure and use as exceeded the exterior lines of the former; and (2) the State's command and direction of, and for maintenance and use of the station, and, in that behalf of and for maintenance and use of increased width of railroad structure, was not primarily by way of and for improvement of the street for public travel therein, but by way of and for improvement of the facilities, conveniences and accommodations of railroad travel and traffic.

The doctrine of the *Lewis* case was an obvious departure from that of the prior *Talbot* and *Conabeer* cases.

That point of departure was specifically noted and rejected by the Court of Appeals in the *Fries* case. The rule of the *Talbot*, *Conabeer* and *Fries* cases is that of the *Birrell*, *Campbell*, *Dolan*, *Ehret*, *Keirns*, *Ketcham*, *Kriete*, *McCarthy*, *Muhlker*, *Niewenhous*, *O'Neil*, *Pape*, *Scholz*, *Siegel* and *Welde* cases, eighteen in all.

These constitute such well defined and authenticated pronouncement of a settled rule of decision, by the New York State courts, as would show obviously and clearly erroneous

and unwarranted, a ruling to the contrary, by the Federal Courts of original jurisdiction sitting in that State.

With stronger reason, if possible, such pronouncement in this particular case, constitutes the law of this case, which this Court, in the exercise of its limited jurisdiction upon this review, may not rightly thrust aside.

GROUNDS OF DECISION ARE LOCAL PROPERTY LAWS EXISTING PRIOR TO 1892.

The opinions in the *Fries* and *Muhlker* cases present citation, examination and elucidation of, and evince that the conclusions therein announced have their foundations in, rules of property law which have commanded practically unbroken recognition, observance and enforcement since the earliest adjudications constituting the judicial history of the State, and that these rules of property law led to a different conclusion than that announced in the *Lewis* case. In whichsoever case, if either, the judgment is erroneous, the error inheres in and consists of misconception or misapplication of the rules and principles of local property law involved in the question as to whether the plaintiff is the owner of or has a property right in the thing constituting the subject matter of the alleged trespass, by such title as is not subject unto the public servitude which is thereby imposed.

ERROR, IF THERE BE SUCH, INVOLVES NEITHER OF THE FEDERAL QUESTIONS URGED HEREIN.

In neither case does the adjudication at all involve any question as to whether the enactment in question does or does not constitute due process of law for the taking of the property, or does or does not impair the obligations of any contract under which plaintiff claims the property.

The trial court had before it evidence of the character and bounds of railroad possession, occupancy and user prior to, and that subsequent to February, 1897, and evidence of the grants, express and implied, which defendants relied upon to justify as well the present as the former railroad structure and operations; the trial court adjudged these sufficient to justify the former occupancy and use; the Court of Appeals approved that adjudication and further adjudged the same grants sufficient to justify the present structure and operations.

Howsoever the state court may have erred in thus adjudging upon and concerning the rules and principles of local property law, involved in the interpretation of and adjudication upon those grants, the case, nevertheless, fails to present any question of the taking of property without due process of

law, or the impairment of the obligations of contracts under provision whereof complainant claims to have acquired the easements alleged to have been taken.

Damage, Actionable or Non-Actionable.

The distinction between the damage in the one instance deemed to constitute the taking of or trespass upon property, and, as such, actionable, and in the other instance deemed consequential only, and, as such, governed by the doctrine of *damnum absque injuria*, does not of necessity have regard to difference in the nature or character of appropriation or burden to which the physical property is subjected, but may rather have regard to difference in the nature and character of property right by and under which the physical property is held.

As instance the appropriation of complainant's land by permanent flooding thereof as in *Pumpelly* v. *Green Bay Co.* (13 Wall. 166) was not more obvious, palpable and permanent than the appropriation of complainant's land by and for public levees as in *Eldridge* v. *Trezevant* (160 U. S. 452); the invasion of property right and impairment of contract obligation, by appropriation of charter right and power to collect tolls for the use of property as in *Monongahela Nav. Co.* v. *United States* (148 U. S. 312) differed in degree but not in kind from compulsion to share the charter right with a business rival as in *Butchers' Union Co.* v. *Crescent City Co.* (111 U. S., 746).

In the *Pumpelly* and *Navigation Co.* cases the complainants were entitled to compensation because their property was of character and held by title which was not subject, otherwise than upon compensation, to the taking or servitude which the appropriation imposed and effected.

In the *Eldridge* and *Butchers' Union* cases the property right was perfect against all invaders until assertion of the right of servitude and regulation whereunto the title was subject. Assertion and exercise of such right and power of servitude and regulation constituted neither taking nor trespass, because it consisted solely of the exercise of existing legal right.

Case at Bar Unlike Elevated Railroad Cases.

The two features which the courts have recognized and adjudged distinctive between the ordinary elevated railroad structure and operations, and the railroad structure and operations herein complained of, are:

1. Whereas, in the instance of the ordinary elevated railroad the public street was created and existed, and abutters' ease-

ments therein and thereover vested and subsisted all free of and unincumbered by railroad occupancy and user or the right thereof, and in such existing status and exigency the railroad had been built, maintained and operated in such street without consent of or grant by abutting owners; here, the railroad company's exclusive possession, occupancy and user antedating the street opening, and uninterrupted thereby, constituted such continuous exclusion of public street occupancy and user, and such continuous encroachment upon, invasion of and interference with the easements claimed by abutters in, upon and over the same land, that at the time to which judicial inquiry was directed, viz.: that of the alleged trespass, the express and implied grants of abutting owners established the rightfulness, as against them, of the exclusive possession, occupancy and use for railroad purposes of the entire ground over which the present railroad structure and operations extend.

2. Whereas, the legislation under which the ordinary elevated railroad was built, maintained and operated, dealt with streets opened and existing, and abutters' easements therein and thereover vested and subsisting free of and unincumbered by railroad occupancy and uses, or the right thereof; and consisted of the mere public consent to such building, maintenance and operation, and therein diversion of the public street from the originally designated and contemplated user, and conference of charter power for acquiring from the abutting owners the property and property rights requisite and necessary to such construction, maintenance and operation; the legislation here in question dealt with land which, if at all or in any the most barren ideal sense a part of the existing public street, was such only in the sense that, and to the extent and degree that, notwithstanding the intervening sixty years of diverse occupancy and user of the land, there still pertained to it some conceivable remnant of the solely potential public street character which was impressed upon it by and by means of the city map of 1811, the Benson and Poillon maps and deeds of 1825 and 1827, the city and railroad company agreement of 1832, and the 1850–1853 acquirement of the legal title to the land upon nominal consideration (pages 33, 34, 65).

Avowed and Effected Object of 1892 Enactment.

The object avowed and effected by the 1892 enactment was improvement of the facilities of public highway travel and not those of railroad travel. The method and means of such improvement were the State's building of the steel viaduct directly above and over the land, which was rightfully, as against abutters, theretofore and thereunto occupied exclu-

sively by the railroad, at such elevation as would admit of extension and use thereunder of the street surface at approximately then existing grade, and compelling the railroad's use of the viaduct, and thereupon enlarging the usable public street surface to include that thereunto as aforesaid occupied and used exclusively for railroad purposes. The existing viaduct structure was built by the State, railroad operations were transferred thereto and are conducted thereon in obedience to the command of the State, and the former railroad structure, as such, was destroyed by the State in and about extension of the street surface upon and over it, and the existing railroad structure and operations are within the same lateral bounds as had theretofore and thereunto been rightfully as against abutting owners occupied and used exclusively by and for the railroad and its operations.

Consequent Proposition.

Upon the distinction thus recognized and adjudged, is based the further proposition: That public highway abutters' property or property rights in easements of light, air and access, or any or either thereof, in, upon and over a strip of land, between two open, traveled streets, or in such easements in, upon and over a street which is, as against such abutter, rightfully subject unto the maintenance and operation of a four-track railroad in and along the middle three-sevenths of the width of such street, in such-wise as to exclude street occupancy and uses from the land occupied and used by and for the railroad, are, in either such case, in such wise limited and qualified by, and subject unto, the right and power of public regulation of street and railroad, conducive to enlargement of the street and its usefulness for public travel therein, that the reasonable exercise of such power of regulation in and by providing an elevated structure and compelling transfer thereto of operations of the four-track railroad, over the same land previously occupied and used exclusively for railroad purposes, is governed by the doctrine of *damnum absque injuria*, in that the damage, if any, thereby occasioned to such easement, is not actionable, because not occasioned by transcendence of the combined legal right of the State and the railroad company as against plaintiff, nor by breach of any legal duty owed by either the State or the railroad company to plaintiff.

Judgment Herein Proceeded on Rules of Law, Observance Whereof Preceded 1892 Enactment.

The hearing invoked by and had upon plaintiff's complaint, as also the evidence adduced *pro* and *con*, and the principles

and processes of reasoning, leading to the conclusions and judgment announced, have all proceeded within and upon the lines of, and subject to the governance of, rules of property law and rules of procedure in respect of character of hearing and grounds of determination, inhering in the general laws of the State, judicial observance whereof long antedated the 1892 enactment.

Neither in and by provision of that enactment, nor in and by application, interpretation or administration thereof in this action, has plaintiff's property or his complaint in respect of alleged taking thereof or of trespass thereon been subjected to or restricted by any new, unusual or exceptional rule of property or process.

By and upon process and procedure invoked by plaintiff, exercised and administered in conformity with long time established and uniformly observed rules of local property law, the State courts have considered and adjudged that the public regulation and carrying into effect thereof, of which plaintiff complains, did not take or trespass upon any property of plaintiff; that if and in so far as the fee, or usable value, of his property is thereby diminished, such diminution is consequential to and upon the lawful exercise of the public right of servitude and public right and power of regulation subject unto which his property was and is held, and hence gives rise to no right of action.

In all this the State courts but administered and adjudged the well-authenticated and long-time-followed rules of process and procedure, and of local property law, which in no wise involved inquiry or adjudication, regarding or in respect of conferrence by the 1892 enactment, of the right and power of the State, or of defendants herein, to take or trespass upon property without compensation, without due process of law, or by impairment of contract obligations.

Therein and thereby the 1892 enactment was accorded and given its purported function and operation as and being a public regulation of public highway and railroad promotive of and conducive to public accommodation, convenience and safety, in the exercise of public highway rights and uses, and thereunto subjection of property held subject unto lawful exercise of that right and power.

That enactment was not given force or effect as or by way of shield or protection against liability in respect of any taking of property, or of any trespass upon property, or of any impairment, contravention or breach of contract obligation.

The local rules of process and procedure and of local property law therein and thereby administered and adjudged as and constituting the foundation of the judgment against the plaintiff and in favor of the defendants, are binding upon, and not subject unto the review and revision of this Court.

Failure of Plaintiff's Case Has Not Resulted from Want of Due Process of Law.

The plaintiff has invoked and had orderly and full hearing preliminary to, and thereupon adjudication by the state courts of competent jurisdiction over the subject matter of his complaint. The conclusion and adjudication against him are based upon the finding that plaintiff and his predecessors in title had either never possessed or had granted away the property rights, the alleged deprivation of which constitutes the gravamen of his complaint. It follows that the judgment, howsoever, if at all, erroneous, is not subject unto the criticism of lack of due process of law.

In *Davidson* v. *New Orleans* (96 U. S. 97), error to the Supreme Court of Louisiana, involving the validity of a local assessment, Mr. Justice Miller, writing for the Court said:

> "The objections raised in the State Courts to the assessments were numerous and varied, including constitutional objections to the statute under which the assessment was made, and alleged departures from the requirements of the statute itself. And although counsel for the plaintiff in error concede, in the first sentence of their brief, that the only Federal question is whether the judgment is not in violation of that provision of the Constitution which declares that no State shall deprive any person of life, liberty or property without due process of law, the argument seems to suppose that this court can correct any other error which may be found in the record" (p. 99).
>
> "In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." (p. 104.)
>
> "As contributing to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us:
>
> "That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate

to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association* v. *Topeka* (20 Wall. 655). But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." (pp. 104, 105).

Missouri Pacific Railway Co. v. *Humes* (115 U. S., 512), error to the Supreme Court of Missouri, was an action under a State statute to recover double damages for the killing of a mule.

Mr. Justice Field, writing for the Court, said:

"If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law." * * * "It is hardly necessary to say, that the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from State legislatures. Our jurisdiction cannot be invoked unless some right claimed under the Constitution, laws, or treaties of the United States is invaded. This court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation." (pp. 520, 521.)

Marchant v. *Pennsylvania Railroad Co.* (153 U. S., 380), error to the Court of Common Pleas, No. 3, for the County of Philadelphia, State of Pennsylvania, was an action for damages occasioned by an elevated road on railroad ground abutting the south side of a street, having a width of fifty-one feet, and opposite plaintiff's property abutting the north side of the street.

The trial resulted in a verdict and judgment for plaintiff for $4,980, which the State Supreme Court reversed, the majority of that Court holding that plaintiff had no cause of action.

Mr. Justice Shiras, writing for this Court, said:

"In reaching the conclusion that the plaintiff, under the admitted facts in the case, had no legal cause of action, the Supreme Court of Pennsylvania was called upon to construe the laws and constitution of the State. The plaintiff pointed to the 10th section of article 1 of the constitution, which provided that 'private property shall not be taken or applied to public use, without authority of law, and without just compensation being first made or secured;' and to the 8th section of article 16, which contains the following terms: 'Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury or destruction.'

"The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having been first made or secured, involves certain questions of fact. Was the plaintiff the owner of private property, and was such property taken, injured, or destroyed by a corporation invested with the privilege of taking private property for public use? The title of the plaintiff to the property affected was not disputed, nor that the railroad company was a corporation invested with privilege of taking private property for public use. But it was adjudged by the Supreme Court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and constitution of that State, constitute a taking, an injury, or a destruction of the plaintiff's property.

"We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that State, and if this record presented no other question except errors alleged to have been committed by

that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the state court, and we should have to dismiss this writ of error for that reason.

"*But we are urged to* sustain and exercise our jurisdiction in this case because it is said that the plaintiff's property was taken 'without due process of law,' and because the plaintiff was denied 'the equal protection of the laws,' and these propositions are said to present Federal questions arising under the Fourteenth Amendment of the Constitution of the United States, to which our jurisdiction extends.

"It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of her property, the proceedings that so resulted were in 'due process of law.'

"The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition." (pp. 384–386.)

In *Remington Paper Company* v. *Watson*, (173 U. S. 443), error to the Supreme Court of Louisiana, the plaintiff, upon its own application, litigated its rights in the Louisiana State Courts.

Mr. Justice McKenna, writing for the Court, says:

"The action was regularly proceeded with, and was determined against plaintiff in error on grounds which did not involve Federal questions, and therefore it is not within our power to review the judgment of the Supreme Court of the State.

"The plaintiff in error thus sought in the state court, and was given an opportunity, to litigate the rights claimed by it, and it cannot complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully." (p. 451.)

POINT II.

Where a property or property right is vested subject unto the right and power of police regulation or public servitude, contract obligation in respect of such property or property right cannot be relied upon to oust or terminate the exercise of the right of such regulation or servitude.

In *Presbyterian Church* v. *Mayor of New York*, (5 Cowen, 538), the corporation of the City of New York had conveyed lands for the purposes of a church and cemetery, with a covenant for quiet enjoyment; and afterwards, pursuant to a power granted by the legislature, passed a by-law prohibiting the use of these lands as a cemetery; the plaintiff alleged breach of the covenant and prayed damages. The defendant pleaded the act of the legislature and by-law in bar of the action, and the plaintiff demurred to that plea: *Held*,

> "The principal question, and the only one which it is necessary to decide, is, whether the by-law of October, 1823, is, *per se*, a violation of the covenant for quiet enjoyment, contained in the deed of the 25th February, 1766, for which the defendants are liable to pay damages.
>
> "The validity of the by-law is asserted by both parties. We are relieved, therefore, from any inquiry on that point.
>
> "The defendants are a corporation, and in that capacity are authorized by their charter, and by-law, to purchase and hold, sell and convey real estate, in the same manner as individuals. They are considered a person in law within the scope of their corporate powers; and are subject to the same liabilities, and entitled to the same remedies, for the violation of contracts, as natural persons. They are also clothed, as well by their charter as by subsequent statutes of the state, with legislative powers; and, in the capacity of a local legislature, are particularly charged with the care of the public morals, and the public health within their own jurisdiction.
>
> "In ascertaining their rights and liabilities as a corporation, or as an individual, we must not consider their legislative character. They had no power as a party, to make a contract which should control or embarrass their legislative powers and duties. Their enactments, in their legislative capacity, are to have the same effect upon their individual acts, as upon those of any other persons, or the public at large, and no other effect.

"The liability of the defendants, therefore, upon the covenant in question, must be the same as if it had been entered into by an individual; and the effect of the by-law upon it the same as if that by-law had been an act of the state legislature. It is expressly authorized by the legislature; and whether it be their act or an act of the local city legislature, makes no difference. (4 Wheat. 652.)

"The plaintiffs, then, are entitled to the same remedy as if the premises had been conveyed to them by an individual, under the like conditions and covenants. This being so, the defendant's proposition is, that the act of the legislature rendering the covenant unlawful, the covenant itself becomes inoperative. * * *

"In 1 Salk. 198, where the same case is reported, the proposition is thus stated: 'Where H covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant. So if H covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, and an act comes and makes it lawful to do it, such act of parliament does not repeal the covenant.'

"That such is the correct rule, as between individuals, seems to be admitted by the counsel for the plaintiffs. But it is contended that the rule is not applicable to a case, where the same party makes the covenant, and afterwards makes the legislative act, which abrogates the covenant. There is, indeed, a seeming inconsistency; but the solution has already been given, viz., that the defendants had no power to limit their legislative discretion by covenant; and they are not estopped from giving this answer." (pp. 540–542.)

In *Coates* v. *Mayor*, (7 Cowen, 584), the validity of the same by-law was contested by way of opposition to enforcement of the penalty therein prescribed. The substance of the holdings of the court is stated in the marginal note as follows:

"A statute (2 R. L. 445, s. 267,) declared to be a public act, authorized the corporation of the city of New York to make various by-laws, when they should deem them necessary and proper: 'and for regulating, or if they find it necessary, preventing the interment of the dead,' within the city. The corporation passed a by-law prohibiting the interment of dead within certain parts of the city, under a penalty; notwithstanding which certain persons interred dead bodies in the part of the city to which the by-law related; the interment was by persons

having a right under grants of, or titles to land holden in trust for the sole purpose of interment, some of which had been used for that purpose for more than a century, and to some of which certain fees for interment were incident, and belonged to the persons interring. A further right was also claimed by individual vault owners, in whose behalf some of the interments were made.

Held, that the by-law was valid and operative as to all these interments.

The act under which it passed is not unconstitutional, either as impairing the obligation of contracts, or taking private property for public use, without compensation; but stands on the ground of being an authority to make police regulations in respect to nuisances.

Held, that the by-law need not recite or adjudge, on its face, that it was necessary; but such necessity was implied by the act of passing it.

Held, also that a declaration for the penalty of the by-law need not aver that such by-law was necessary.

Necessity, as intended by the statute, is nearly synonymous with *expediency*, or what is necessary for the public good.

Held, that the length of time, 100 years, during which part of the premises in question had been used for interring the dead, was not conclusive against the power of the legislature, or the corporation, to pass the laws.

Held, also, that though premises be granted for a certain purpose, and long used for that purpose, this will not prevent the use afterwards being treated as a public nuisance.

Though a corporation grant lands for the purpose of interment, and even covenant that they shall be quietly enjoyed for that purpose, they are not thereby estopped afterwards to pass a by-law forbidding such interment, under a penalty.

Such a by-law repeals the covenant.

Semb., the powers of the corporation of the city of New York, depends on statute which has superseded their original charter, especially as to those things in relation to which the statute makes provisions, either agreeing with or differing from the charter."

To the like effect is the case of *Gushee* v. *City of New York*, (42 App. Div. 37), the nature of the case and points adjudged being recited in the head note as follows :

"The department of parks of the city of New York in executing a contract by which it grants the privilege of maintaining a restaurant in a building owned by the city

and located in one of its public parks, at a stipulated monthly rental, acts in a private and not in a governmental capacity.

"The fact that the privilege is granted for a fixed period of five years does not render the contract void as a matter of law, upon the ground that it constitutes an attempted abdication by the department of parks of its power to continuously exercise its discretion in the management of the park.

"Where such a contract provides that the privilege granted shall be subject to all rules, regulations and ordinances then or thereafter prescribed by the department of parks relating to the conduct of the privileges granted and to the general management and government of the park, the licensee is entitled to the undisturbed enjoyment of his privilege so long as there is no regulation necessarily interfering with the conduct of the restaurant, and so long as the department of parks deems it best that a restaurant shall be maintained therein.

"If, however, the department of parks shall, at any future time, determine in good faith to discontinue the restaurant, the licensee's privilege will terminate.

"*Semble*, that this would be true even were there no provision in the contract making it subject to any regulations or ordinances which the department might subsequently see fit to enact."

Upon this principle, this court, in *Butchers' Union Co.* v. *Crescent City Co.* (111 U. S., 746), sustained as being a rightful exercise of police power, the state grant of corporate power and privilege to the *Butchers' Union Company* which contravened the exclusive rights and privileges which previous legislation purported to vest in the *Crescent City Company*, and which previous legislation had been adjudged valid by this court in the *Slaughter House* cases (16 Wall. 36).

CONTRACT OBLIGATION IS DEEMED SUBJECT UNTO STATE'S RIGHT OF POLICE POWER.

The city corporation and the railroad company were and are the creatures of the State. As to each, the State has at all times possessed the right and power of amendment and alteration of their respective charter powers. Neither could by entering into contract obligation with or to plaintiff's predecessors in title deprive the State of, or cripple its exercise of, the right and power to regulate the street and railroad conducive to enlargement of the usefulness of the street in and for its primary purposes; or deprive the State of the right and power to itself, or by a corporation created for the purpose,

build, maintain and operate, upon a line selected by either, a railroad for common carrier service, upon payment of compensation for and thereby acquirement of the land requisite and used therefor. Any contract with either corporation must, as matter of law, be deemed to have been entered into with knowledge of and regard to such right and power of the State, and to intend that obedience to the direction or command of the State in contravention of the letter of the obligation shall not be accounted a breach of the obligation.

Contention to the contrary is to say that the creature of the State may do what the State itself may not do, to wit, by contract restrict the State in the right of exercise of its police power.

An enactment in such case prescribing police regulation in contravention of the terms of the contract, is not nullified by the federal constitution inhibition of impairment of the obligation of the contract.

Lord vs. *Thomas*, 64 N. Y. 107.
Brown vs. *Colorado*, 106 U. S. 95.
Pennsylvania College Cases, 13 Wall. 190.
Chicago, &c., R. R. Co. vs. *Nebraska*, 170 U. S. 57.

The holdings of the state court that, as against plaintiff, the state possessed the right and power of such regulation of street and railroad maintenance and use as was prescribed by and carried into effect in pursuance of the 1892 enactment, and that consequential damage and loss thus occasioned was governed by the doctrine of *damnum absque injuria*, viewed in the light of the proofs and findings as to the origin, history and character of street and railroad maintenance and use to which those easements were incident, evinces that as matter of local property law pertinent thereto, those easements, if at all owned by plaintiff, were deemed to be held not by title absolute, but subject unto the impress of the right and power of state regulation and servitude such as was therein exercised.

In *Goszler* v. *The Corporation of Georgetown*, (6 Wheat. 593), the corporation having been given the power to graduate the streets, exercised that power in and by establishing a grade prescribed by an ordinance of May, 1799. In September, 1816, it passed an ordinance directing alteration of the grade, and plaintiff, an abutting owner, sought to enjoin enforcement thereof.

The contention was that the power was not a continuing power, and that "the ordinance of May, 1799, is in the nature of a compact and is unalterable." (p. 593.)

Marshall, *C. J.* "The second point presents a question of some difficulty. One object of the ordinance probably

was, to give as much validity to the graduation made by the commissioners, as if it had been made under the direct superintendence of the corporate body. But it cannot be disguised, that a promise is held forth to all who should build on the graduated streets, that the graduation should be unalterable. The court, however, feels great difficulty in saying that this ordinance can operate as a perpetual restraint on the corporation.

"When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution. A corporation can make such contracts only as are allowed by the acts of incorporation The power of this body to make a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abridge its own legislative power." (pp. 597, 598.)

In *Stone* vs. *Mississippi*, (101 U. S., 814), Waite, *C. J.*, at page 817, says:

"All agree that the legislature cannot bargain away the police power of a State. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.'"

Pennsylvania College Cases, (13 Wall. 190), error in three suits to the Supreme Court of Pennsylvania, argued and adjudged together, involved validity of an enactment which it was contended impaired the obligation of a contract.

"Whether the act of Assembly in question in this case is or not repugnant to the constitution of the State is conclusively settled against the complainants by the decision in this very case, and the question is not one open to re-examination in this court, as it is not one of Federal cognizance in a case brought here by a writ of error to a State court. Nothing, therefore, remains to be examined but the second question presented in the pleadings, which is, whether the supplementary act of Assembly uniting the two institutions and providing that there should be but one location of the same for any purpose, impairs the obligation of the contract between the State and the corporation of Jefferson College, as created by the original charter; or, in other words, whether it is repugnant to

the tenth section of the first article of the Federal Constitution." (p. 212.)

* * * * *

"Such contracts were made with the trustees and not with the State, and it is a mistake to suppose that the existence of such a contract between the corporation and an individual would inhibit the legislature from altering, modifying, or amending the charter of the corporation by virtue of a right reserved to that effect, or with the assent of the corporation, if, in view of all the circumstances, the legislature should see fit to exercise that power." (p. 222.)

In *Eldridge* v. *Trezevant* (160 U. S. 452), the plaintiff, a citizen of another State and grantee of the United States, complained of the taking of his land without compensation for use as and for a public levee.

This court followed the state law and state court decisions in holding the lands lawfully subject unto this servitude, and that such appropriation thereof was *damnum absque injuria.*

In *Meyer* v. *Richmond* (172 U. S. 82), Mr. Justice McKenna, writing for the court at page 94 *et seq.*, says:

"The petition submitted for decision the power of the city of Richmond to make or authorize the obstruction complained of under its charter, and the constitution and laws of Virginia as well as the prohibition of the Constitution of the United States. If the decision necessarily passed on and denied the latter as we hold it did, and hence entertain jurisdiction to review its judgment, it necessarily passed on and denied the former. If under the constitution and laws of Virginia whatever detriment he suffered was *damnum absque injuria*, he cannot be said to have been deprived of any property.

* * * * * * *

"The substantial thing is not that one may be damaged by an obstruction in a street—not that one may be specially damaged beyond others, but is such damage a deprivation of property within the meaning of the constitutional provisions? According to the Virginia cases an additional servitude may be said to be another physical appropriation, and hence another taking, and must be compensated. But the plaintiff's case is not within this doctrine, nor is there anything in the decisions of Virginia which makes consequential damages to property a taking within the meaning of the constitution of that State. Decisions in other States we need not resort to or review. Those of this court furnish a sufficient guide."

POINT III.

"State decisions construing the State statute of limitations in respect to real property, and declaring what constitutes adverse possession, and the effect thereof, when continued for the period of limitation, constitute a rule of property binding upon the federal courts of law and in equity in adjudicating upon titles to land within that State."

Elder v. *McClaskey* (17 C. C. A. 251), and certiorari denied (163 U. S. 685), and cases cited in opinion by Taft, Circuit Judge.

Lobenstine v. *Union El. R. Co.*, 80 Fed., 9; 25 C, C. A., 304.

Shelby v. *Guy* (11 Wheat. 361), involved the question of the effect of the words, "persons beyond seas," in a state statute of limitations, as applied to persons in another colony or state in America.

JOHNSON, *J.*: "That the statute law of the States must furnish the rule of decision to this Court, as far as they comport with the constitution of the United States, in all cases arising within the respective States, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may, at times, involve us in seeming inconsistencies; as, where States have adopted the same statutes, and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed on us, to administer, as between certain individuals, the laws of the respective States, according to the best lights we possess of what those laws are." (p. 367.)

Green v. *Neal* (6 Pet. 291), involved application of the statute of limitations of Tennessee in determining the question of title to real estate.

MCLEAN, *J.* (p. 297): "In a great majority of the causes brought before the federal tribunals, they are called to enforce the laws of the states. The rights of parties are determined under those laws, and it would be a strange perversion of principle if the judicial exposition of those laws, by the state tribunals, should be disregarded. These ex-

positions constitute the law and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope,

"It is admitted in the argument that this Court, in giving a construction to a local law, will be influenced by the decisions of the local tribunals; but, it is contended, that when such a construction shall be given in conformity to those decisions, it must be considered final. That if the state shall change the rule it does not comport either with the consistency or dignity of this tribunal to adopt the change. Such a course, it is insisted, would recognize in the state courts a power to revise the decisions of this court and fix the rule of property differently from its solemn adjudications. That the federal court, when sitting within a state, is the court of that state, being so constituted by the constitution and laws of the Union; and, as such, has an equal right with the state courts to fix the construction of the local law.

"On all questions arising under the constitution and laws of the Union this court may exercise a revising power, and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the supreme court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court; not because the state tribunal, in such a case, has any power to bind this court, but because in the language of the court, in the case of Shelby *et al.* v. Guy, 11 Wheat. 361, 'a fixed and received construction by a state, in its own courts, makes a part of the statute law.'

"The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the state tribunals should change the construction. A reference is here made, not to a single adjudication, but to a series of decisions which shall settle the rule. Are not the injurious effects on the interests of the citizens of a State as great, in refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case as well as in the other has the effect to establish, in the State, two rules of property.

"Would not a change in the construction of a law of the United States, by this tribunal, be obligatory on the State courts? The statute, as last expounded, would be the

law of the Union; and why may not the same effect be given to the last exposition of a local law by the state court? The exposition forms a part of the local law, and is binding on all the people of the State, and its inferior judicial tribunals. It is emphatically the law of the State, which the federal court, while sitting within the State, and this court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the legislature of the State may modify the law or repeal it.

"If the construction of the highest judicial tribunal of a State form a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute, from what had at first been given to it? The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the State at the time the decision is made? This constitutes the rule of property within the State, by which the rights of litigant parties must be determined.

"As the federal tribunals profess to be governed by this rule, they can never act inconsistently by enforcing it. If they change their decision, it is because the rule on which that decision was founded has been changed." (pp. 297–300.)

Livingston v. *Moore* (7 Pet., 469), error to the Circuit Court, involved validity of a statute enacted to prescribe a method of enforcing the lien of the State upon the lands of its debtors.

JOHNSON, *J.*: "Now the relation in which our circuit courts stand to the States in which they respectively sit and act, is precisely that of their own courts, especially when adjudicating on cases where state lands or state statutes come under adjudication. When we find principles distinctly settled by adjudications, and known and acted upon as the law of the land, we have no more right

to question them, or deviate from them, than could be correctly exercised by their own tribunals" (p. 542). * * * "The rule of law being once established by the highest tribunal of a State, courts which propose to administer the law as they find it, are ordinarily bound, *in limine*, to presume that, whether it appears from the reports or not, all the reasons which might have been urged, *pro* or *con*, upon the point under consideration, had been examined and disposed of judicially." (p. 543.)

Leffingwell vs. *Warren* (2 Black, 599), error to the District Court of the United States for the District of Wisconsin, the error upon which the judgment was reversed was that the trial court had not followed the State courts' interpretation of the statute of limitations.

Mr. Justice Swayne, writing for this Court (page 603), says:

"The Courts of the United States, in the absence of legislation upon the subject by Congress, recognize the Statutes of Limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Act of 1789.

"The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text. * * *

"If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this Court will follow the latest settled adjudications. * * *

"The equities in behalf of the plaintiff below, are strong. We have all felt their force. Without any fault on his part, he has been divested of the title to his land. But our duty is to apply the law—not to make it. If this statute be unwise or unjust the remedial power lies with the Legislature of the State, and not with this Court."

Tioga Railroad v. *Blossburg, etc., Railroad* (20 Wall. 137), involved the question of the right of the Tioga Railroad Company, a foreign corporation, to avail itself of the New York Statute of Limitations.

"The counsel for the plaintiff in error (the defendant below) insists 'that it was proved and conceded that during all the time of the existence of the contract of 1851, the defendant had property within the State of New York, an office at Corning, New York, directors, officers, and agents, constantly within this State, and at all times amenable to the process of its courts; and, in fact,

in 1855, the plaintiff availed itself of this condition of things by bringing a suit against the defendant for a portion of the demand claimed under the contract now in controversy, recovered judgment and collected the same, and that in fact this suit was commenced by personal service of a summons upon the defendant's agent at Corning; and that it is, therefore, apparent that the Tioga company has been, at all times, subject to a suit at law for any debt it owed to the Blossburg company or any other party,' and he argues that the statute of limitations is therefore a defense.

If the facts appeared as stated by the counsel, it could not avail the plaintiff in error. The courts of New York have decided (and two of the decisions were made upon the case of this very company), that a foreign corporation cannot avail itself of the statute of limitations of that State. And this notwithstanding the defendant was the lessee of a railroad in New York, and had property within the State, and a managing agent residing and keeping an office of the company at Elmira, within the State. These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principles." (p. 143.)

POINT IV.

State Court decisions in respect of property having its situs therein, and in respect of thereto appurtenant rights and liabilities, whether founded upon the State Constitution, statute or common law, constitute a rule of property binding upon the federal courts adjudicating upon titles, rights or liabilities pertaining to such property in that State.

Subject only to a well-founded exception obviously foreign to the case at bar, the binding force of the rules of local property law as recognized and administered in the courts of the respective States, as well in the construction of State Statutes as also in the application of common-law principles, is so uniformly observed and numerously illustrated in the adjudications of this court as to render uncalled for any general reference to the cases.

Brief reference to a very few of them will serve to exhibit the reasons and principles upon which those local property

rules are held to control as constituting indeed the administration of the law of the respective State.

Walker v. *State Harbor Commissioners* (17 Wall. 648), involved title to lands, adjudication whereof proceeded upon construction of a state statute relative to "tide lands."

> Mr. Justice FIELD: "It is not for us to express any opinion as to what would be our construction of the act had the Supreme Court of the State never spoken on the subject. In the construction of the statutes of a State, and especially those affecting titles to real property, where no Federal question arises, this court follows the adjudications of the highest court of the State. Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness. It becomes a part of the statute, as much so as if incorporated into the body of it, and in following the statute as thus interpreted we only apply to a local question the law of the place. As has been often remarked, infinite mischiefs would result if, in construing State statutes affecting titles to real property, where no Federal question is involved, a different rule were adopted by the Federal tribunals from that of the State courts." (p. 651.)

Townsend v. *Todd*, (91 U. S. 452), involved the validity of a mortgage as affected by the construction placed upon the State recording acts.

> "In most of the States, a mortgage like the one before us, reciting a specific indebtedness, but given in fact to secure advances or indorsements thereafter to be made, is a valid security, and would be good to secure the $6,000 actually advanced before other incumbrances were placed upon the property. 11 Ohio, St. 232; 12 id. 38; 34 N. Y. 307; 35 id. 500; 22 id. 380; 2 Sand. Ch. 78; 6 Duer, 208. We should be quite willing to give the appellant the benefit of this principle to the extent of his actual advances; but the contrary rule seems to be so well settled in Connecticut, that we are not at liberty to do so. The decree below vacating and cancelling the appellant's mortgage, being in conformity with that rule, is *Affirmed*." (pp. 453, 454.)

Detroit v. *Osborne*, (135 U. S. 492), error to the United States Circuit Court, was an action for damages occasioned by a defective sidewalk.

> Mr. Justice BREWER: "This contention suggests two inquiries: First, What is the settled law of Michigan? and Second, If it be as claimed, is it binding upon the federal courts?" (p. 495.)

"The second inquiry must be answered in the affirmative. If it is a matter of local law, that law is obligatory upon the federal courts. It must be conceded that this adjudication as to the liability of a city for injuries caused by a defect in the sidewalks, the repair of which it has both the power and duty to provide for, is not in harmony with the general rule in this country, 2 Dillon on Mun. Corp. 3d ed. Secs. 1017, 1018; nor in accord with the views expressed by this court. In *Barnes v. The District of Columbia*, 91 U. S. 540, this court, after referring to the case from 21 Michigan, *supra*, and the doctrine stated therein, observed that 'the authorities establishing the contrary doctrine, that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them,' citing in support a long list of authorities. The authorities which support a different view are collected in *Hill* v. *Boston*, 122 Mass. 344. But even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that State. Whatever our views may be as to the reasoning or conclusion of that court, is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts, and all its citizens, and all others who may come within the limits of the State. The question presented by it is not one of general commercial law; it is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the State. While this court has been strenuous to uphold the supremacy of federal law, and the interpretation placed upon it by the federal courts, it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. There should be, in all matters of a local nature, but one law within the State; and that law is not what this court might determine, but what the Supreme Court of the State has determined. A citizen of another State going into Michigan may be entitled under the federal Constitution to all the privileges and immunities of citizens of that State; but under that Constitution he can claim no more. He walks the streets and highways in that State, entitled to the same rights and protection, but none other, than those accorded by its laws to its own citizens.

"This question is not a new one in this court. In the case of *Claiborne County* v. *Brooks*, 111 U. S. 400, 410, it

was held that, 'when the settled decisions of the highest court of a State have determined the extent and character of the powers which its political and municipal organizations may possess, the decisions are authoritative upon the courts of the United States;' and in the opinion it was observed: 'It is undoubtedly a question of local policy with each State what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State.'

"What was there decided in reference to the powers is equally true as to the liabilities of a municipal corporation. The city of Detroit, in the discharge of its public duty in respect to keeping the streets and sidewalks in repair, is under no higher or different obligation to a citizen of Ohio than to one of the State of Michigan, and the measure of its liability under the statutes, as stated, is to be determined by the judgment of the Supreme Court of that State, and not by what our opinions might be as to the proper construction of those statutes. Reference may also be made to the recent case of *Bucher* v. *Railroad Company*, 125 U. S. 555, 584, in which this court followed, against its own judgment of the law, the rulings of the Supreme Court of Massachusetts, and held that a party traveling on Sunday, and not for necessity or charity, in the cars of a railroad company, could not recover for injuries sustained by the negligence of the company, because he was himself thus violating the law of the State. Concluding the opinion of the court in that case, it is observed: 'It may be said generally that whenever the decisions of the State courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess* v. *Seligman*, 107 U. S. 20. Where such local law or custom has been established by repeated decisions of the highest courts of a State, it becomes also the law governing the courts of the United States sitting in that State," (pp. 497–500.)

In *N. Y. & N. E. Railroad Co.* v. *Bristol* (151 U.S. 556), error to the Supreme Court of Errors of the State of Connecticut, the railroad company challenged the validity of an enactment

relating to grade crossings as depriving it of the equal protection of the laws.

Mr. Chief Justice FULLER:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. (p. 567.)

"We are asked upon the grounds above indicated to adjudge that the highest tribunal of the State in which these proceedings were had, committed, in reaching these conclusions, errors so gross as to amount in law to a denial by the State of rights secured to the company by the Constitution of the United States, or that the statute itself is void by reason of infraction of the provisions of that instrument.

"But this court cannot proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved, and in respect of them we are of opinion that our interposition cannot be successfully invoked.

"As observed by Mr. Justice Miller in *Davidson* v. *New Orleans*, 96 U. S. 97, 104, the Fourteenth Amendment cannot be availed of 'as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.' To use the language of Mr. Justice Field, in *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, 520, 'it is hardly necessary to say, that the hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity: and that the remedy for evils of that character is to be sought from state legislatures.'" (p. 570.)

Sioux City Railroad Co. v. *N. A. Trust Co.*, (173 U. S., 99), certiorari to the Circuit Court of Appeals, presented the question whether bonds, issued by an Iowa corporation in excess of its charter powers, were enforceable against it.

Mr. Justice White, following an examination of the course of decisions upon the question in the Iowa State Courts, says:

> "Whether, as an independent question, if we were enforcing the Iowa statute, we would decide that the issue of stock by a corporation in excess of a statutory inhibition was not void but merely voidable, need not be considered, since, as we have said, in applying an Iowa law, we follow the settled construction given to it by the Supreme Court of that State." (pp. 112, 113.)

Wade v. *Travis County*, (174 U. S., 499), certiorari to the Circuit Court of Appeals for the fifth circuit, was brought to recover upon interest coupons; the lower federal courts followed what was deemed to be the rule thereunto adjudged by the state courts. Thereafter, the state courts announced a rule claimed to be inconsistent with the former one and this court followed the later announcement of the state court, and therein reversed the judgment of the Circuit Court of Appeals and of the Circuit Court.

Mr. Justice Brown:

> "But assuming that the latter case was intended to overrule the prior ones, and to lay down a different rule upon the subject, our conclusion would not be different. In determining what the laws of the several States are, which will be regarded as rules of decision, we are bound to look, not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them." (Citations omitted.)
>
> "If there be any inconsistency in the opinions of these courts, the general rule is that we follow the latest settled adjudications in preference to the earlier ones." (p. 508.)

Hartford Ins. Co. v. *Chicago, &c., Railway*, (175 U. S., 91), certiorari to the Circuit Court of Appeals, was instituted in the Iowa State Court and removed by the defendant to the United States Circuit Court.

Plaintiff, Insurance Company, sought to recover of defendant Railroad Company the sums which plaintiff had paid on policies issued by it for loss by fire of a storage warehouse and contents, owned by a partnership and situate upon defendant's railroad grounds at Monticello, Iowa, which fire, it was alleged, was caused by defendant's negligence. Defendant, by answer, pleaded a provision in the lease exempting it from liability for such loss caused by negligence of itself or servants.

Plaintiff demurred to the answer on the ground that such exemption from liability was void as against public policy.

At the argument of the demurrer it appeared that the same

question was then pending in the Supreme Court of the State of Iowa, and judgment upon the demurrer was suspended to await the decision of the state court. Upon the rendering of final decision in the state court sustaining the validity of the release of liability the demurrer was overruled, and plaintiff declining to plead further, final judgment was rendered in favor of defendant.

MR. JUSTICE GRAY:

"That judgment was unanimously affirmed by the Circuit Court of Appeals, upon the ground that the stipulation was valid, and was not against public policy; Judges Sanborn and Thayer, however, expressing the opinion (Judge Caldwell non-concurring in this respect) that the decision of the state court was not conclusive upon this question. (p. 95.) * * *

"Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union—when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court. * * *

"The validity of the agreement now in controversy does not depend upon the Constitution, laws or treaties of the United States, or upon any principle of the commercial or mercantile law, or of general jurisprudence.

"Generally speaking, the right of a railroad corporation to build its road, and to run its locomotive engines and cars thereon, within any State, is derived from the legislature of the State; and it is within the undisputed powers of that legislature to prescribe the precautions that the corporation shall take to guard against injuries to the property of others by the running of its trains; as well as the measure of its liability in case such injuries happen." (pp. 100, 101.) * * *

POINT V.

The right and power to prescribe the rules of property law whereby recovery of consequential damage, occasioned by or under authority of a State, to real property in its domain, shall be accorded or refused, is matter of State prerogative not surrendered to federal governance, nor subject of its supervision.

Pennsylvania R.R. Co. v. *Miller*, 132 U. S. 75.
Marchant v. *Pennsylvania R.R. Co.*, 153 U. S. 380.

DOCTRINE OF *damnum absque injuria*, ADJUDGED TO GOVERN HEREIN, IS RECOGNIZED AS FUNDAMENTAL IN NEW YORK AND FEDERAL COURTS.

It is respectfully submitted that the decisions of the New York courts evince uniform and conclusive recognition of, as being a fundamental rule of property therein, that, in the absence of statutory provision to the contrary, the doctrine of *damnum absque injuria* governs all cases of consequential damage to real estate or to the use thereof, occasioned by the carrying into effect of measures commanded, directed, or specifically authorized by the state, primarily promotive of, or designed to promote the public safety, and convenience; or occasioned by subjection to the burden of public servitude of property or property right vested and held subject unto the right and power of such servitude.

The case of *Radcliff* v. *Brooklyn*, 4 N. Y. 195, though not the earliest, is regarded as a leading case in the application of this principle as a rule of property. Its principle is identical with that of *Callender* v. *Marsh*, 1 Pick. 417, which was cited and approved by this court in *Smith* v. *Corp. of Washington*, 20 How. 135, 149, which in turn, upon this point, was cited and approved in *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Chicago* v. *Taylor*, 125 U. S. 161; *Wabash R. Co.* v. *Defiance*, 167 U. S. 88; *High Bridge Lumber Co.* v. *United States*, 69 Fed. 324; *Bauman* v. *Ross*, 167 U. S. 548, 587.

The principle of the *Radcliff* case has been recognized and approved by the New York Court of Appeals in many cases, among which are the following:

In *Bellinger* v. *N. Y. Central R.R Co.* (23 N. Y. 42, *48*, *52*) in respect of damages caused by so building a railroad as to obstruct a stream; *held* that the limitation upon the power to take property for public use without compensation,

"has no application to cases where property is not taken,

but only subjected to damages consequential upon some act done by the State or pursuant to its authority." (page 48.)

"Whether it was practically possible to have fixed the grade so that this '(damage by flooding)' would not have happened, can only be determined by the judgment of men skilled in such matters. The defendants, as the judge at the trial very properly said, were not insurers. But they were authorized to build the railroad at the place where they did build it; and if, necessarily and in spite of all reasonable safe guards and precautions in constructing the work, occasional disturbance to adjoining lands would arise from a winter freshet, it was the misfortune of the plaintiff that he had lands exposed to such occurrences." (page 52.)

In *Selden* v. *Del. & Hud. Canal Co.* (29 N. Y. 634, 642), plaintiff sought recovery of damage caused to his premises by raising of canal embankments and deepening of the canal by defendants whereby his premises were flooded.

"There is no allegation of bad faith on the part of the defendants, or their agents, or of any negligence or want of skill in the construction or management of the work whatever. The damages, as appears from the complaint, are mere consequential damages, naturally flowing from the construction and maintenance of the work, by reason of the nature and character of the structure, and not by reason of any negligence or unskillfulness in the carrying on or in the completion of the work of enlargement, and the evidence upon the trial, in this respect, seems to be all of the same character."

Held: no cause of action was alleged or proved.

In *Coster* v. *Mayor of Albany* (43 N. Y. 399, 415), *held:* that statutory provision of right of compensation for "all damages caused to property by the making of such improvement," did not apply to or embrace consequential damages.

Uline v. *N. Y. C. & H. R. R.R. Co.* (101 N. Y. 98, *101*), was for recovery of damages in respect of a railroad in a public street.

EARL, J.:

"But wherever a railroad is lawfully built with proper care and skill, there it is not a nuisance. What the law sanctions and authorizes is not a nuisance, although it may cause damages to individual rights and private property. If a railroad be built upon a highway, after acquiring the public right and the private property, if any, in the street or the soil thereof, then the owners thereof are

not responsible for any damages necessarily resulting from the construction or operation of the railroad to private property adjacent or near to the road, and so, too, the law has been settled in this State by many decisions" (page 107). * * *

"We have a case then where the defendant did acts in the street entirely lawful and where it was held liable for the consequential damages to the plaintiff's adjacent property, caused by the careful use of its lawful authority and the proper exercise of its legal rights. To uphold this recovery upon such a theory would subvert a very important rule of law about which there has been no substantial question in this State for at least thirty years." (page 108.)

In *Conklin* v. *Railroad Co.* (102 N. Y. 107, *111*), the defendant company having acquired the statutory right to cross a highway subject to the duty of so restoring the highway as not to impair its usefulness, crossed the highway below grade and bridged over its tracks and changed the grade of the highway approaches to the bridge and thereby inconvenienced the owner of the abutting land who owned the fee to the centre of the highway.

"The plaintiff's fee in it to its centre line was not subjected to a new or different use involving a new or added compensation, but it remained unchanged as the public highway originally laid out in everything but its grade. If it became such by dedication, compensation for the easement was expressly waived. If taken by right of eminent domain, the compensation paid covered all the damages sustained, among which were necessarily embraced such as might flow from a change of grade required for the public use and convenience. That might be altered by any lawful authority, and whatever of injury or inconvenience should result to the abutting owner was either waived by the dedication or paid for by the original compensation, so that a change of grade upon a highway invades no private right" (page 111).

Heiser v. *Mayor of New York* (104 N. Y. 68, *72*), was an action for damages alleged to have been occasioned by change of grade of a street.

"Before the act of 1872 no liability, either at common law or by statute, existed on the part of the defendant to owners of real estate, for injuries occasioned to them by changes of grade in the streets adjoining their premises." (Citations omitted.)

"Neither did the act of 1872 purport to create any such

liability except in the mode pointed out, and to the extent prescribed by such act.

"An appraisal by the board of assessors was by the statute made a condition precedent to the recovery of any compensation on the part of the injured party; the amount thereof was required to be assessed upon the premises thereby benefited; the right to enforce payment was predicated upon such appraisal and was limited to a claim for the delivery of assessment bonds by the comptroller, for the amount of the award made. No provision was made for the payment of such damages by the city at large, or in any other manner.

"The statute assumed to create a right where none existed before, and it defined not only the extent of the the right, but also the method of its enforcement.

It is well settled in the case of public improvements authorized by statute, wherein a mode of compensation is provided for persons injured thereby, that such mode is exclusive, and no right of action exists in their favor except that directed in the statute." (page 72.)

Atwater v. *Trustees*, etc. (124 N. Y. 602, *608*, *610*), was an action to recover damages occasioned by the flooding of plaintiff's pasture land whereby he lost the use thereof for one season. The flooding was caused by a dam built to prevent the flow of water causing interference with the building of a highway bridge.

The Court found there was no want of reasonable care in the execution of this public work; distinguished the case from the *St. Peter* v. *Denison* case (58 N. Y. 416), in that there was no trespass, the injury resulting consequential from the doing of the work; and, further distinguished it from *Pumpelly* v. *Green Bay Co.* (13 Wall. 166), in that the flooding was not permanent. The case was held governed by the doctrine of the *Radcliff* case, the matter of complaint *damnum absque injuria* and the direction of a verdict in favor of defendants affirmed.

In *Benner* v. *Atlantic Dredging Co.* (134 N. Y., 156, 161), plaintiff alleged damage in wrongfully and unlawfully so discharging blasts as to shake, jar, damage and injure his dwelling house. Defendant was engaged in work as a contractor under the United States Government, in the removal of obstructions in navigable waters.

LANDON, J.: "It being lawful for the sovereign to exercise its lawful power, it must follow that whatever results from its proper exercise is not unlawful, and if any injury, direct or consequential, results to the individual, he is remediless, except so far as the sovereign gives him a remedy."

In *Rauenstein* v. *N. Y., L. & W. R. Co.* (136 N. Y. 528, *536*, 537), plaintiff, the owner of premises abutting Commercial street, sought damages alleged to have been occasioned by raising the grade of that street to permit travel thereon over the grade of the railroad in Water street, the supposed ground of illegality thereof being that the railroad in Water street was illegal as to abutting owners there.

GRAY, J.: "The two guiding principles to be deduced from the authorities are, that the defendant, being lawfully in Water street, by authority of the public law and with the assent of the municipality, was not a nuisance, and, except as to abutters, invaded no legal rights; and that, in building the embankment in Commercial street, to permit of unimpeded travel upon that street over the railroad in Water street, the defendant was performing a duty imposed by the public law and prescribed by municipal ordinance, and, hence, could come under no responsibility to adjoining land owners. In this connection, I may say that for such consequential damages as are sought to be recovered here from a railroad company, which is lawfully in the occupation and use of a street, but which, incidentally, is the occasion of injury to property owners in an adjoining street, by reason of its performance of the statutory duty to conform its grade to the new use, the legislature might very properly, under limitations, grant a remedy. Without such remedial legislation, however, the case is one of *damnum absque injuria*. Nothing in the *Reining* case is in contradiction of the views expressed, and in support of them we have much authority, running back from the *Uline* case (*supra*) to that of *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195).

"This construction in Commercial street was a change of grade, made by the defendant under legal compulsion, and individual interests are as much subordinate to the requirements of public interests in such a case, as, concededly, they would be if, as matter of fact, the city authorities had done the work themselves. As matter of law, its performance by the defendant was a performance by a constituted public authority." (pages 536, 537.)

In *Cogswell* v. *Railroad Co.* (103 N. Y., 10, *15*, *19*), an action for damages occasioned by alleged nuisance in the maintenance and use of a locomotive engine house adjacent to plaintiff's premises; as also in *Hill* v. *Mayor of N. Y.* (139 N. Y. 495, *501*), to enjoin the maintenance and use of the city's one-half of a pier for the purposes complained of as injurious to the use of plaintiff's one-half thereof; as also in *Folmsbee* v. *City of Amsterdam* (142 N. Y. 118, *122*), for

damages occasioned to plaintiff's premises by change of the established grade of a street, the defendant's reliance upon exercise of public authority as justification was held untenable in that the very thing complained of had not been authorized by the legislature.

In *Uppington* v. *City of New York* (165 N. Y. 222, *229*), plaintiff, an abutting owner, sought to recover damages alleged to have been occasioned to her house through the construction of a sewer by means of an open trench in the street.

> "VANN, *J.:* When a municipal corporation has general authority by statute to make a public improvement in a public street, which does not involve direct incroachment upon private property, it is not liable for consequential damages, unless they are caused by negligence, misconduct or want of skill on the part of its servants or agents" (citations omitted). "In such cases the corporation is the agent of the state, and acts done in the proper exercise of governmental powers do not make such agent liable at common law, even if they indirectly affect but do not directly invade private property. If the work is unlawful, the injury willful, or the damages are owing to the failure of the proper authorities to exercise due care or skill, there is no exemption from liability, even when the undertaking is wholly for the benefit of the public.
>
> "The relief sewer, which is the subject of this controversy, was lawful, because it was built wholly in a public street, without encroaching upon private property, and was duly authorized by statute. Such damages as were inflicted upon abutting property were an indirect result of the work and were not caused by willful misconduct." (pages 228, 229.) * * * * * * * *
>
> "As was said in *Atwater* v. *Trustees* (*supra*), which is an instructive case, 'serious injury to property may be occasioned by the lawful exercise of powers of public character pursuant to law, and if the work is carefully and skillfully performed the consequences may be *damnum absque injuria* when the legislature has provided for no compensation. In such case the protection of the owner of property not taken or appropriated, which may be subjected to hazard or injury, is in the care and skill to be observed by those engaged in the execution of the work. If they fail to do that they are liable for the consequences of such failure.'" (p. 232.)

The principle involved is altogether the same as that in the case of *Scranton* v. *Wheeler* (179 U. S. 141), error to the Supreme Court of Michigan, wherein the state court *held*, and this court affirmed the holding,

> "that the United States is not required to compensate an

owner of land fronting on a public navigable river when his right of access from the shore to the navigable part of such river is permanently obstructed by a pier erected in the river under the authority of Congress for the purpose only of improving navigation." (p. 141.)

Mr. Justice Harlan said:

"The vital question, therefore, is the one heretofore mentioned, namely, whether the prohibition in the Constitution of the United States of the taking of private property for public use without just compensation has any application to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands away from but in front of his upland, and which pier was erected by the United States not with any intent to impair the rights of riparian owners but for the purpose only of improving the navigation of such river.

Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that Amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this court has announced a rule that will embrace every case. But what has been said in some cases involving the general question will assist us in determining whether the present plaintiff has been denied the protection secured by the constitutional provision in question." (pp. 153,154.)

The opinion refers to and quotes from the case of *Pumpelly* v. *Green Bay Co.* (13 Wall. 166), a case of permanent overflow of land, and proceeds as follows:

"That case was relied upon in *Transportation Co.* vs. *Chicago*, 99 U. S., 635, 642, as establishing the invalidity of certain municipal acts looking to the improvement of a public highway. But this court said that 'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property

to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority.' * * *

"When erecting the pier in question, the Government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce. In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the Government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress." (pp. 154, 165.)

So here the purport of the enactment was the improvement of the street for public travel therein. The method of such improvement was of necessity chosen with reference to the railroad right subject to which the street existed. The title of plaintiff to easements of light, air and access was not a full, complete and absolute title, but a qualified title, held subject to such regulation of the public street as should be found suited to its character as a railroad street.

It is undisputed that the regulation prescribed and carried into effect by the State was one suited to the purpose of improving the street for its primary purpose and use, of public travel therein. There is no reasonable ground upon which to impute to the acts, grants and proceedings culminating in the production of this street as it existed at the date of the 1892 enactment the intent or contemplation that the paramount authority of the State to regulate the street promotive of public convenience should be crippled by compelling the State to make compensation for loss or damage thereby occasioned to abutters' easements.

As in *Gibson* vs. *United States* (166 U. S., 269), appeal from the Court of Claims, involving claim of damage in respect of an improvement of navigation, whereby free ingress and egress to and from plaintiff's premises was prevented, this Court by Mr. Chief Justice Fuller, said:

"The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the

lawful and proper exercise of a governmental power" (p. 275).

"Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the Government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes.

"In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject" (p. 276).

So here the damage complained of is not the result of the taking of plaintiff's property, but the incidental consequences of the lawful and proper exercise of a governmental power.

Moreover, public highway abutters' ownership of easements is subject to the obligation to suffer the consequences of improvement of the public street in the exercise of the dominant right of the State in that regard. The legislative direction of and for such improvement consisted of assertion of a right belonging to the State, to which abutters' easement property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes.

In short, the damage resulting from the prosecution of this improvement of a public street, for the public good, was not the result of the taking of plaintiff's property, and was merely incidental to the exercise of a servitude to which his easements have always been subject.

Within the principle as above recognized and vindicated, is the body of State law contained in the State Constitution, statutes and common law rules of the State of New York, which distinguish between the case of property taken for, or trespassed upon by a public use, and that of, thus occasioned, consequential damage to property; and which recognize invasion of property right, and afford remedy in respect of the former, and refuse recognition of invasion of property right, and deny remedy in respect of the latter.

The 1892 enactment constituted assertion by the State of the right and power to enlarge the area and usefulness of the avenue for public travel therein, by the improvement prescribed

by, and carried into effect under that act. It left intact and unaffected by its provisions the body of rules of State Constitution, statute and common law whereby plain and adequate right and remedy are prescribed and afforded in respect of private property taken for or trespassed upon by any public use. It also left intact, the authority and power of the defendant Harlem Company, to acquire by condemnation whatsoever property might be requisite for the building, maintenance and operation of its railroad in conformity to law, which was conferred upon and vested in it by Section Eight of its Charter (Supp. hereto, p. 4), and by Sections Four and Seven of the Railroad Law (Chap. 565, Laws of 1890), as amended (Chap. 676, Laws of 1892).

The sufficiency of these for and their adaptability to the exigencies presented by plaintiff's case is not challenged by either party to this record, and is conclusively exhibited in the *Reining*, *Egerer*, *Am. Bank Note Company*, *Bohm* and *Sperb* cases, *supra*.

Thus it is not herein, and cannot in any case be disputed, that the right of action and remedy for such taking of or trespass upon private property, if any, as may be committed in and by compliance with or carrying into effect of the 1892 enactment, is as plain and adequate as if that enactment had embraced express provision of and for such right and remedy.

And upon this principle is based the judgment of the Court of Appeals in the *Dolan*, *Ehret*, *Ketcham*, *Mt. Morris Bank*, *Pape* and *Welde* cases, *supra*, in respect of this 1892 enactment.

If the 1892 enactment had contained express provision for compensation for property taken or trespassed upon by such elevation of the railroad and enlargement of the street as was therein provided for, complaint and proof as plaintiff presents herein would nevertheless have involved the question whether therein and thereby his property was indeed taken or trespassed upon, and the basis and theory for determination of these questions would have been exactly the same as that of the *Radcliff* and other like cases, and that upon which the case at bar was determined. And if that enactment had contained express provisions of right of compensation for "all damages caused to property by the making of the improvement" or other words of like import, such complaint and proof as is herein presented would nevertheless have involved the question as in *Coster* v. *Mayor*, *supra*, and *Marchant* v. *Pennsylvania R.R. Co.*, *supra*, whether such provision did or did not apply to and embrace mere consequential damages.

Either such question is none the less a non-federal one because involving application and interpretation of rules of state law as adjudged and determined by the state courts, rather

than application and interpretation of specific legislative enactment.

Detroit v. *Osborne*, 135 U. S. 492.

The trial court found and adjudged that the improvement, executed in pursuance of the enactment, trespassed upon plaintiff's easements, and further adjudged existing laws applicable to and adequate for ascertainment of, and award of compensation for the property the subject of that trespass.

The Court of Appeals did not reverse the judgment upon the ground or theory that the lower court had erred in adjudging existing laws applicable to and adequate authority for ascertainment and award of compensation for property taken or trespassed upon, but did reverse the judgment upon the ground and theory that the damage occasioned was consequential merely, and hence not actionable.

This is purely a local question, and as decided shows plaintiff not in position to contend that the enactment is invalid, in that it fails to provide compensation in favor of any who may suffer actionable damage resultant from the carrying into effect of its provisions.

Castillo v. *McConnico*, 168 U. S. 674.
Tyler v. *Registration Court Judges*, 179 U. S. 405.
Hooker v. *Burr*, 194 U. S. 415.

Summary.

The plaintiff invoked and had herein the usual and ordinary process, the orderly and full hearing, and thereupon determination and adjudication in respect of the alleged taking of and trespass upon his easements in Park avenue in and by the maintenance and use of the elevated railroad structure described in his complaint.

The said structure was directed and built by the State, and used in obedience to the command of the State, extending above and over, and supported by columns standing in and upon, land which was theretofore and thereunto, rightfully, as against plaintiff, occupied and used exclusively by and for the railroad. The State directed and carried into effect this elevation of railroad structure and operations for the purpose of and thereby effected the enlargement of the street surface by embracing therein and extending the same over the ground theretofore as aforesaid occupied and used exclusively by and for the railroad and its operations.

In and by the proceedings taken and had in the said action only long-time-established process and procedure were availed of and followed, and only long time-established and vindicated rule of property laws were administered.

The 1892 enactment, which plaintiff alleges to be violative of the federal constitution, as and by way of (1) taking his property without due process of law, and, (2), impairing the obligations of contracts, contained no provision the purport whereof would or might in any wise deprive complainants of, or restrain them in or about availing themselves of the plain and adequate process and remedy provided by existing laws in respect of property taken for, or trespassed upon in and about the carrying into effect of, a lawfully authorized public use. That enactment was not in any wise asserted or relied upon by the defendants as or by way of a defense or shield to protect them from liability in respect of any property appropriated or contract obligation violated, nor was it in any wise adjudged to constitute such shield in respect of either property taken or contract broken.

The power of the State to prescribe and carry into effect this regulation as and for and by way of enlargement of the street surface for public travel therein was taken for granted by both parties, and all questions in respect of the possession of such power or of the proper exercise thereof, excluded from dispute by the nature and form of the action and issue. The questions litigated had relation solely to the fact and measure of taking of or trespass upon private property, which had resulted from the carrying into effect of the provisions of the enactment.

The ground upon which plaintiff was adjudged disentitled to recover was, that in so far as it appeared that plaintiff had any right or title in or to the easements, the subject of the alleged taking and trespass, his right and title thereto were in such wise subordinate and subject unto respective and joint public street and railroad servitude that the acts and conduct of which he complained did not constitute any taking of or trespass upon the said easements, invaded no legal right and violated no legal duty, and hence that the loss and damage alleged were within and governed by the rule of *damnum absque injuria*.

The judgment is founded upon interpretation and application of local rules of law, following and consequent upon the exercise and administration of ordinary and usual process, and in no wise involving any question to which federal constitution inhibitions have relation.

The petition in error should be dismissed for want of jurisdiction, or, the judgment should be affirmed.

IRA A. PLACE,
Attorney for Defendants in Error.

THOMAS EMERY,
Of Counsel.

INDEX.

LEGISLATIVE ENACTMENTS.

Page.

Act of 1831, to incorporate The New York and Harlem Railroad Company.

Sec. 1. Where road to be located 1
To be single or double track road 1
To use steam, animal or mechanical power or any combination of them 1
Sec. 2. To make survey and file map of location in N. Y. County register's office, map not to be filed until route approved by common council of city 1
Sec. 8. Right of way lands, not donated, to be purchased from owners. 4
Authorized to appropriate by eminent domain proceedings... 4
Upon compliance with terms Company to be seized of lands in fee simple 4
Sec. 10. If located in any street shown on city map to leave space on either side for driveway and sidewalk 5
Sec. 11. To erect and maintain sufficient fence upon line of railroad... 5
Sec. 16. Not to be constructed across or along any street designated on city map without consent of Mayor, etc 6
Mayor, etc., may regulate time and manner of use and speed of trains 6
Sec. 18. Legislature may alter, amend, modify or repeal this act 6

Act of 1837, to alter the map of the city.

Sec. 3. Fourth avenue from Thirty-fourth street to Harlem river widened by adding twenty feet on each side 7

Act of 1848, to amend act relating to the New York and Harlem railroad.

Sec. 6. New York and New Haven Railroad Company to run trains on New York and Harlem Railroad under agreement with Harlem Company; may use steam, animal or mechanical power or combination thereof 8

Act of 1859, to extend charter of New York and Harlem Railroad Company and determine mode of using same in the streets of New York.

Sec. 2. Empowered to use steam from northern extremity of Manhattan Island to south side of Forty-second street, and upon sidings, etc 8
Sec. 3. Reserves right to rescind, alter or amend this act 9

Act of 1867, to protect travelers on Fourth avenue in the City of New York.

Provides regulation of walls and railings beside, and arches over tracks south of Ninety-second street 9

Act of 1872, to regulate the use of the Fourth avenue in the City of New York.

Sec. 1. Prescribes viaducts, bridges, tunnels, etc., from Forty-fifth to Ninety-sixth streets 11
Prescribes lower grade of railroad south of Ninety-sixth street. 11
Present grade to continue from Ninety-sixth to One Hundred and Fifth street 13

Page.

Prescribes lowering of grade from One Hundred and Fifth to One Hundred and Thirty-third street 12
Road to be on viaduct from Ninety-eighth to One Hundred and Fifteenth street 12
Bridges at designated streets; where railroad in cut, streets to be supported by retaining walls 12
These to be surmounted by coping and iron railing 12
Sec. 2. Authorizes temporary tracks during doing of prescribed work 12
To lay down permanently two additional tracks 13
To make landings for entrance and delivery of passengers 13
Sec. 6. Provides and designates board of engineers to execute, direct and superintend the improvement 13
Sec. 7. Expense to be borne by city and railroad company in equal proportions 14
Sec. 8. Provides for general tax levy for two years to pay city's one-half of expense 14
Sec. 9. Mayor, etc., forbidden to obstruct the work here provided for; municipality authorized and directed to pass necessary ordinances to facilitate the work 15
Tunnel and railway to be for exclusive use of railroad company 15
Trespassing thereon made a penal offense 15
Sec. 10. Upon completion trains to run by steam thereon, including depot at and switches, etc., north of Forty-second street 15
Right reserved to alter, amend or repeal this act 15

Act of 1892, to regulate, improve and enlarge Park avenue north of One Hundred and Sixth street, etc.

Sec. 1. Prescribes changes of railroad grade established by act of 1872. 16
Sec. 2. Prescribes character of structure to carry railroad 16
Sec. 3. Existing structures to be removed, cut to be filled and space paved same as avenue is now paved 17
Sec. 4. Viaduct to be of prescribed clear height over intersecting streets and those now closed to pass under it 17
Sec. 5. Supporting columns of railroad structure, positions and dimensions 18
Sec. 6. Viaduct floor structure 18
Sec. 7. Railroad company authorized to erect designated station houses 18
Girders may be supported by columns at curb-lines of Park avenue from 124th to 126th streets 18
Secs. 8, 9, 10, 11 and 12. Relate to structures at and north of Harlem river 18
Sec. 13. Provides board to execute, direct and superintend construction of the improvement 20
How board to conduct the work 20
Sec. 14. Railroad company to pay for improvement and one-half of $1,500,000 to be reimbursed by city of New York 21
Sec. 15. City to issue bonds to pay its one-half of cost 22
Secs. 16–20. Authorize assessment and tax for fund to pay bonds 22
Secs. 21–23. Relate to bridge over Harlem river and viaduct north of river 26

Page.

Sec. 24. Mayor, etc., to adopt all necessary ordinances to facilitate improvement. 27
Improved structure to be for exclusive use of railroad company..... 27
Sec. 25. Cost of stations to be borne by railroad company..... 27
Sec. 26. Board to begin and complete improvement expeditiously 28
When completed trains to be run thereon by steam 28
Sec. 27. Board to act upon all questions by a majority vote..... 28

Act of 1894, to amend Act of 1892.

Sec. 1. Amends Sec. 4 as to structure between 111th and 115th streets. 28
Sec. 2. Amends Sec. 14 by providing for amendment of plans of structure 111th to 115th streets..... 29
City to pay one-half, but not more than $50,000 of additional cost..... 29
Sec. 3. Empowers board to amend plans..... 30
Avenue between 111th and 115th streets to be enlarged and paved..... 30

Act of 1896, to further amend Act of 1892.

Sec. 1. Amends Sec. 7 so as to direct railroad company to build station at 125th street..... 31
Prescribes location, character and dimensions of station..... 31
Prescribes width and form of structure 123d to 127th streets.. 32
Plans theretofore adopted to be deemed amended accordingly. 32
Railroad company authorized to thus alter this portion of viaduct structure..... 32

Act of 1898, to further amend Act of 1892.

Transfers from Park Avenue Board to Commissioner of Highways the further exercise of power conferred by original act..... 33

JUDICIAL DECISIONS.

People ex rel. *N. Y. & Harlem R.R. Co.* v. *Havemeyer, Mayor of N. Y.* (47 How. Pr., 494).

	Original.	Herein.
Opinion by Westbrook, *J*.....	495	34
Status created prior to 1872.....	495	34
Effect of Acts of 1859 and 1867.....	496	35
Analysis of Act of 1872.....	497	35
Action taken thereunder by the railroad company and the city..	499	37
Facts and legal questions presented	500	38
Mandamus the proper remedy.....	501	38
Certificate includes only lawful charges against the city.....	503	40
Act involves no injustice to the city.....	505	42
Act does not impair obligation of January, 1832, contract.....	507	43
Act not violative of State Constitution.....	509	44
a. Embraces but one subject.....	509	44
b. Subject is stated in title	509	45
c. In itself states tax and object thereof.....	510	45
d. Does not offend by appointment of members of board...	512	46
e. Does not impose on city payment for benefit of railroad company.....	513	48
Objections urged have been waived.....	516	49

	Original.	Hervin.
Tocci v. *Mayor*, etc. (73 Hun, 46).		
Opinion by Van Brunt, *P.J.*	47	51
Taxpayers' action to restrain payment by city under Act of 1892.	47	51
Alleges act unconstitutional, as imposing on city contribution to railroad company	47	51
Facts show payment by city for benefits and privileges received.	47	51
Railroad status prior to and under Act of 1872	48	51
Act of Congress requirement answered by change of railroad grade north of 125th street	48	52
Act of 1892 provided enlargement and improvement of avenue.	48	52
By whom and how cost of improvement to be paid	49	52
Viaduct to be for exclusive use of railroad company	49	53
Is not a gift of city's money or credit to railroad company	50	53
Railroad right dealt with by the enactment	51	54
Legislative cognizance and purpose	51	54
Railroad surrendered street surface to city	52	55
Talbot v. *N. Y. & H. R.R. Co.* (151 N. Y., 155).		
Opinion by Bartlett, *J.*	158	56
Subject-matter of action	158	56
Analysis of Act of 1872	158	56
Conditions created thereunder	159	57
Effect upon plaintiff's premises	160	58
Case presented is change of street grade by railroad company as agent of the state board	161	58
Facts show no liability	161	58
N. Y. & U. S. Court cases cited	162	59
Conabeer v. *N. Y. & Harlem* (156 N. Y., 474).		
Statement of case	476	60
Object of action	476	60
City map or plan of contemplated streets	476	60
Streets not opened	476	61
Incorporation and powers of railroad company	477	61
Railroad company complied with act	477	61
Then condition of adjacent lands	478	62
Grant to railroad company	478	62
Railroad built on viaduct	478	62
Avenue widened because of railroad	478	62
Avenue opened long after railroad built	478	62
Nominal award to railroad company	479	62
Its exclusive possession not disturbed	479	62
Act of 1872, brief summary of	479	63
Railroad structure created thereunder	480	63
Leased to and operated by Central company	480	63
Plaintiff's title, acquirement and character	480	63
Effects of railroad maintenance and operation	480	64
Viaduct and street dimensions	481	64
Opinion by Martin, *J.*	482	64
Railroad title authority for viaduct	482	64
Damages incident to railroad use	483	65
Grant contemplated and covered these damages	484	65
No abandonment resulted from railroad use being less than grant.	484	66
Title not affected by making of city map	485	66

	Original.	Herein.
Opening of avenue did not divest railroad company's rights	486	67
1872 improvement consented to by state and city	487	67
Alleged damage resulted from proper use of railroad	487	68
N. Y. cases, citation and comment	487	68
Case distinguished from elevated railroad cases	488	69
Railroad right not affected by city's acquirement of fee of land	488	69
Plaintiff not entitled to injunction	489	69
Cases, citation and comment	489	69
Plaintiff not entitled to have railroad ground opened as street	490	70
Plaintiff's purchase during and with knowledge of railroad use	491	70
Relief demanded by plaintiff was rightly refused	491	71
Lewis v. N. Y. & *Harlem* (162 N. Y., 202).		
Opinion by Vann, *J.*	218	71
Claims and contentions of parties	218	71
Railroad built, under what conditions	219	71
Avenue was one *in posse* only	219	72
Railroad entry imputed to city's title	219	72
Possession not hostile as to city	220	73
Plaintiff not entitled to posture of complainants in elevated railroad cases	222	74
Conditions of fact presented	223	75
Railroad possession as against plaintiff was open and hostile	223	75
And of such duration as presumes grant	223	76
Authorities, citations and comment	224	76
Plaintiff disentitled to recover in respect of 1872 structure	224	76
Railroad right deemed prescriptive is measured by user	225	76
Defendants not liable for erection of viaduct structure	226	77
Change of grade was for public purpose and wholly in interest of public	226	77
Defendants are liable upon and by reason of their use of viaduct	227	78
Damage caused and measured by increased height of railroad use	228	78
Subject to mitigation by increase of facilities of access	228	78
Railroad right not abandoned by change of railroad structure	228	79
Avenue opening created no new easements in original width of avenue	229	79
Decision limited to case in hand	229	79
Welde v. *N. Y. & Harlem* (168 N. Y., 597).		
Opinion by O'Brien, *J.*	598	80
History of railroad and avenue, summary of	598	80
Adriance grant to railroad company	599	80
Railroad structures, present and former	599	81
Viaduct erected by State Commission	600	82
1896 amendment, provisions of	600	82
Legal questions presented	601	82
Authorities, citation of	602	83
Answers to questions suggested, not necessary to reversal	602	83
Award included elements not warranted upon the facts	603	84
Fries v. *N. Y. & Harlem* (169 N. Y., 270).		
Opinion by O'Brien, *J.*	273	85
Plaintiff's property and contentions	273	85

	Original.	Herein.
Appeal involves examination of principle upon which judgment is founded	273	85
Findings of a trial court render inconsequential discussion as to effect of deed to R. Co. by plaintiff's predecessor in title	274	85
Findings cover character of former railroad structure and right thereof	274	85
Also how changed and under what authority	274	86
Also shows, if under lawful authority of state constitution, no trespass	275	87
Authorities, citation and comment	277	88
Judgment not supportable if enactment within state authority	277	88
Authorities exclude ground of question as to lawfulness of such exercise of authority	277	88
Railroads' obedience to command of state was not a trespass	278	89
Elevated railroad cases distinguished	278	89
Judgment below not warranted by Lewis case	279	89
Exceptions to evidence	280	90
Opinion by Martin, *J.*	282	92
All agree that 1892 enactment did not transcend lawful powers of state	282	92
Question presented is that of liability for consequential damage	282	92
Case controlled by principle of lawful change of grade of street. N. Y. cases cited	283	93
Aside from Lewis case judgment herein rests on doctrine of El. R. cases	284	93
Those cases distinguishable from this one	284	94
Opinion by Cullen, *J.* (dissenting)	285	94
States propositions deemed settled law and cites cases, Radcliff case doctrine should not be extended	285	94
Act of 1892 is not unconstitutional, and no decision to that effect is necessary to secure plaintiff's rights	288	97
Muhlker v. *N. Y. & Harlem* (173 N. Y., 549).		
Opinion by Parker, *Ch. J.*	551	97
Facts herein same as in Lewis and Fries cases	551	97
Summary of history of railroad and avenue	551	98
Act of Congress, requirements of	551	98
State legislation necessary to railroad compliance therewith	551	98
State embodied this necessary legislation with provision for improvement of avenue	552	98
Improvement made by state for public benefit	552	98
Opinion in *Lewis* case quoted from	552	99
New trespass, doctrine of Lewis case was subsequently deemed erroneous	553	100
The reasoning being that the improvement was made by the State in the public interest	553	100
Preservation of railroad right as provided was within the duty and power of the State	554	100
Fries case opinions quoted as exhibiting grounds of conclusion contrary to *Lewis* case	554	100
Reining case cited in dissenting opinion in *Fries* case distinguished	555	101

	Original.	Herein.
All agree that the act is not unconstitutional	556	102
Doctrine of *Radcliff* and other cases cited in *Fries* case governs this one	556	102
State had power to make this improvement without providing compensation	557	102
Opinion of Bartlett, *J.* (dissenting)	557	103
Statement of case and of contentions of parties	557	103
Under case made defendants cannot support claim of absolute title	560	104
Act of 1892 is not unconstitutional	560	104
It was not necessary to plaintiff's recovery that the act provide for compensation	560	105
Fundamental error in *Fries* case is the holding of the doctrine of *damnum absque injuria* applicable	560	105
Case is not within rule governing change of street grade	560	105
The circumstances dealt with and provisions of the Act impute to the work a character other than is stated in the Fries case	561	106
This case is within the doctrine of the El. R. cases	562	107
Keirns v. *N. Y. & Harlem* (173 N. Y., 642).		
Per Curiam:		
Judgment reversed and complaint dismissed on authority of *Fries* and *Muhlker* cases	642	109
Opinion by Vann, *J.*	642	109
Facts are same as in Lewis and Fries cases	642	109
Fries case was decided on point not raised or considered in Lewis case	642	109
Lewis case went on theory that defendants having title by prescription, were liable for increased damage by user of railroad at higher elevation	642	109
Fries case went on theory that state had the right to change railroad grade and defendants were not liable for consequential damage thereby occasioned	643	109
Had this point been raised in Lewis case judgment might have been reversal instead of affirmance	643	110
Ground of *stare decisis* compels vote for reversal	643	110
Dolan v. *N. Y. & Harlem* (175 N. Y., 367).		
Opinion by Haight, *J*	368	111
Plaintiff's premises abut 125th street station part of viaduct	369	111
Reversal on authority of Muhlker and Fries cases, because judgment includes damage for viaduct	369	111
Condition of Park Avenue as reason for general provisions of Act of 1892	369	111
Evident purpose was improvement of avenue	369	112
Different reasons for widening of structure to increase station accommodations	370	112
Act of 1896 enjoined specified performance of railroad company's charter obligations	371	113
Damages should be awarded if occasioned by station houses exceeding defendants' right	371	113
New trial awarded accordingly	371	113

	Original.	Herein.
Kriete v. *N. Y. & Harlem* (175 N. Y., 484).		
Per Curiam; on authority of Fries, and Muhlker cases, held, plaintiff has no remedy	484	110
Statute is not violative of State or Federal Constitution in particulars claimed	484	110
Ketcham v. *N. Y. & Harlem* (177 N. Y., 247).		
Opinion by Bartlett, *J.*	248	113
Plaintiff's premises are opposite station	248	113
Trial court's findings	249	114
What the court has decided:		
a. Viaduct is a public improvement and defendants not liable in respect thereof	250	114
b. Station houses are a railroad improvement	250	115
Damages awarded herein cover both station and viaduct	251	115
If plaintiff establish injury resulting from stations, should recover accordingly	251	116
Judgment reversed, new trial ordered	251	116

CHAP. 263.

AN ACT to incorporate the New-York and Harlaem Rail-Road Company.

Passed April 25, 1831.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

SEC. 1. Benjamin Bailey, Mordecai M. Noah, Benson McGown, James B. Murray, Charles Henry Hall, Moses Henriques, Isaac Adriance, Thomas Addis Emmet, Gideon Lee, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen and Robert Stewart, with such other persons as shall associate with them for that purpose, are constituted a body politic and corporate, by the name of the New-York and Harlaem Rail-Road Company, with power to construct a single or double rail-road or way, from any point on the north bounds of Twenty-third street, to any point on the Harlaem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, with a branch to the Hudson river, between One hundred and twenty-fourth street and the north bounds of One hundred and twenty-ninth street, to transport, take and carry property and persons upon the same, by the power and force of steam, of animals, or of any mechanical or other power, or of any combination of them which the said company may choose to employ; and by that name, they and their successors shall be and they are hereby vested with the right and privilege of constructing, erecting, building, making and using a single or double rail-road or way for the purpose aforesaid, and for the term of thirty years from the passage of this act.

SEC. 2. If the corporation hereby created shall not within six months from the passage of this act, locate the route of said rail-road or way and the branch to the same, and make a survey of such location, and file a map thereof in the register's office of the city and county of New York, and within two years from the passage of this act commence, and within four years from the passage of this act construct, finish, and put in operation the said single or double rail-road or ways, then the said corporation shall thenceforth forever cease, and this act shall be null and void; but no such map shall be filed until the same shall have been submitted to and approved by the common council of the city of New-York; such approbation shall be expressed by a joint resolution of the said common council, declaring their approbation of the map, and of the route of the said rail-road indicated therein.

SEC. 3. The capital stock of the said company shall be three hundred and fifty thousand dollars, and the stock shall

be divided into shares of fifty dollars each, and shall be deemed personal property, transferrable in such manner as the by-laws of said corporation shall direct.

SEC. 4. Isaac Adriance, Mordecai M. Noah, Benjamin Bailey, Moses Henriques, Thomas Addis Emmet, Benson McGown, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen, and Robert Stuart shall be commissioners, the duty of whom it shall be, on or before the first Monday of June next after the passing of this act, at some suitable place in the city of New-York, to open books to receive subscriptions to the capital stock of the said corporation, and twenty days' public notice shall be given by the said commissioners of the time and place of opening such books, in one of the public newspapers of the said city; and said books shall be kept open for three days from ten to two o'clock of each day, and within ten days after the said stock shall be subscribed, to give a like notice for a meeting of the stockholders, at such time and place as the said commissioners shall appoint, to choose thirteen directors, and such election shall be then and there made by such of the stockholders as shall attend for that purpose, either in person or by proxy, each share of the capital stock entitling the stockholder to one vote; and the said commissioners shall be inspectors of the first election of directors of the said corporation, and shall certify, under their hands, the names of those duly elected, and deliver over the subscription books to the said board of directors; and the time and place of holding the first meeting of the first directors shall be fixed by the said commissioners, and the said board of directors shall have power to appoint an engineer, and cause such examinations and surveys for the said rail-road to be made as may be necessary to the selection by them of the most advantageous line, course or way for the said way; and the said board of directors shall, after such examinations and surveys shall be made, select and under their hands and seals, designate the line, course or way, which they may deem most advantageous for the said rail-road, one of which certificates shall be filed in the office of the register of the city and county of New-York; which line, course or way, so selected and certified, shall be deemed the line, course or way on which the said corporation shall construct, erect, build or make their single or double rail-road or ways as hereinafter mentioned; the expenses of all which surveys and examinations, and all manner of incidental expenses relating thereto, shall be paid for by the said corporation.

SEC. 5. The commissioners shall proceed to distribute the capital stock of the said corporation among the subscribers thereto; and in case there should be subscriptions to more than the amount of such stock, within the time above pre-

scribed, it shall be the duty of the said commissioners to apportion the same among the subscribers thereto, in such manner as they shall deem most advantageous to the interest of the institution; but no person who shall have subscribed for twenty shares or upwards, shall, upon such distribution, receive less than twenty shares, unless the subscriptions for the said last mentioned or a less number of shares, shall exceed the whole amount of the capital stock; nor shall there be allowed to any one of the commissioners or subscribers, directly or indirectly, or to any one in trust, for him, more than two hundred shares of said stock, if, without such allowance, the whole of the stock be taken up; and if, at the expiration of the third day on which the subscription books shall have been kept open, the whole amount of the capital stock shall not have been subscribed, then the commissioners may subscribe for the remaining shares.

SEC. 6. The said board of directors to be chosen at such meeting, or at such annual election, shall, as soon as may be after every election, choose out of their own number one president, and one other person to be vice-president; and in case of the death, resignation or absence of the president, the vice-president shall preside until the annual election thereafter, or until he shall return, or another president shall be chosen; and in case of the death or resignation of the president or vice-president, or of any director, such vacancy or vacancies may be filled for the remainder of the year, wherein they may happen, by the board of directors; and in case of the absence of the president and vice president, the board of directors shall have power to appoint a president *pro tempore*, who shall have and exercise such powers and functions as the by-laws of the said corporation may provide.

SEC. 7. In case it should at any time happen that an election of directors shall not be made on any day when pursuant to this act it ought to have been made, the said corporation shall not for that cause be deemed to be dissolved, but such election may be held at any other time directed by the by-laws of the said corporation, within sixty days after the day on which it should have been held.

SEC. 8. The said corporation are hereby authorized, by their agents, surveyor, and engineers, to enter upon such route, place or places, to be designated as aforesaid by the said directors, as the line, course, road and way whereon to construct their single or double rail-road or ways; and it shall be lawful for the said corporation to enter upon and take possession of and use all such lands and real estate as may be indispensable for the construction and maintenance of their single or double rail-road or ways, and may also receive, hold and take all such voluntary grants and donations of land and real estate as shall

be made to the said corporation, to aid in the construction, maintenance and accommodation of the said single or double rail-road, or ways, provided that all lands or real estate thus entered and taken possession of and used by the said corporation, and which are not donations, shall be purchased by the said corporation, of the owner or owners of the same, at a price to be mutually agreed upon between them; and in case of a disagreement of price, and before the making of any portion of the road upon said land, the said corporation or the owner of such land may apply by petition to the vice-chancellor of the first circuit, who upon such application shall cause such notice to be given to the other party as he shall deem proper and sufficient, appointing therein the time and place of hearing the parties, at which time and place, upon proof that the notice directed has been given, the said vice-chancellor shall direct the manner of ascertaining the damages which the owner of such land or real estate will sustain by the occupation thereof by the said corporation; and the said vice-chancellor shall appoint three competent and disinterested commissioners, who shall be freeholders and residents of the city of New-York, and who shall, under the direction of the said vice-chancellor, make appraisements and determine said damages and report in writing under their hands to the said vice chancellor, who shall examine the same and hear the parties in relation thereto if he shall deem it expedient, and increase or diminish the damages if he shall be satisfied injustice has been done. The report shall contain a minute and accurate description of the land appraised. The commissioners shall be allowed three dollars each a day for their services. Upon proof to the said vice-chancellor, to be made within thirty days after his determination of payment to the owner or of the depositing to the credit of the owner in such incorporated moneyed institution, as the said vice chancellor shall direct, of the amount of said damages and the payment of all expenses, the said vice-chancellor shall make an order or decree, particularly describing the land and reciting the appraisement of damages and the mode of making it, and all other facts necessary to a compliance with this section of this act; and when the said order or decree shall be recorded in the office of the register of the city and county of New-York, the said corporation shall be seized and possessed of the fee simple of all such lands or real estate, and may enter upon, take and use the same for the purposes of the said road.

SEC. 9. In case any married woman, infant, idiot or insane person or non-resident of the state, who shall not appear after such notice, shall be interested in any such land or real estate, the said vice-chancellor shall appoint some competent disinterested person to appear before the said commissioners and act

for and in behalf of such married woman, infant, idiot, insane person or non-resident.

SEC. 10. The said corporation is hereby authorized to construct, erect, build, make and use a single or double rail-road or ways, of suitable width and dimensions, to be determined by the said corporation, on the line, course and way, selected or designated by them in manner aforesaid, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, and shall have power to erect and maintain toll-houses and such other buildings for the accommodation of their concerns, as they may deem suitable to their interests: The said corporation shall not take any lands without the consent of the owner or owners thereof, exceeding forty feet in width from east to west, and shall in case of their locating the route of the said rail-road in or along any public street or avenue now laid out on the map or plan of the city of New-York, leave sufficient space in the said street or avenue on each side of the said railroad for a public highway for carriages, and for a side walk for foot passengers.

SEC. 11. Whenever it shall be necessary for the construction of their single or double rail-road or way, to intersect or cross any stream of water or water courses, or any road, street or highway, it shall be lawful for the said corporation, with the consent and approbation of the mayor, aldermen and commonalty of the city of New-York, to construct their single or double rail-road or ways across or upon the same; provided that the corporation shall restore the stream or water course or road, street or highway thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness, and shall moreover erect and maintain sufficient fences upon the line of the route of their single or double rail-road or ways.

SEC. 12. It shall be lawful for the company hereby incorporated, from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation of property or persons on the single or double rail-road or ways aforesaid, hereby authorized to be constructed, erected, built, made and used.

SEC. 13. If any person or persons shall wilfully do or cause to be done any act or acts whatever, whereby any building, construction or work of the said corporation, or any engine, machine or structure, or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or persons so offending shall forfeit and pay to the said corporation double the amount of damages sustained by means of such offence or injury, to be recovered in the name of the said corporation, with costs of suit, by action of debt.

SEC. 14. Each subscriber shall pay twenty per cent on the amount subscribed by him, at the time of making such subscription; and it shall be lawful for the directors or a majority of them, to require payment of such other sums of the capital stock at such times and in such proportions and on such conditions as they shall deem fit, under the penalty of the forfeitures of all previous payments thereon, and shall give notice of the payments thus required, and of the place and time when the same are to be paid, at least thirty days previous to the payment of the same, in a public newspaper published in the city of New-York.

SEC. 15. The said corporation shall possess the general powers, and be subject to the general restrictions and liabilities prescribed by such parts of the eighteenth chapter of the first part of the Revised Statutes as are not repealed.

SEC. 16. Nothing in this act shall be deemed to authorize the said corporation to construct or use their single or double rail-road or way across or along any of the streets or avenues as designated on the map of the city of New-York, whether such streets or avenues shall have been opened or not, without the consent of the mayor, aldermen and commonalty of said city, who are hereby authorized to grant permission to the said corporation to construct their said rail-road or way across or along said streets or avenues, or prohibit them from constructing the same, and after the same shall be constructed, to regulate the time and manner of using the same, and the speed with which carriages shall be permitted to move on the same or any part thereof; and nothing in this act contained shall prevent the legislature from granting to any other corporation or persons, the right of constructing a rail-road or roads parallel with the one herein mentioned, or any part of it, on any lands, street, road or avenue not occupied by the rail-road or way hereby authorized, or the right of crossing or intersecting the same at any point or points, without making compensation for injuries sustained thereby.

SEC. 17. No person who shall at the time be a member of either branch of the common council of the city of New-York, shall act as commissioner or director of said corporation under this act.

SEC. 18. The legislature may at any time alter, amend, modify or repeal this act.

CHAP. 274.

AN ACT to alter the map or plan of the city of New-York.

Passed April 27, 1837.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

SEC. 1. All that part of Forty-First-street lying between the Fifth and Sixth avenues; also all that part of Sixty-Eighth-street lying between the Third and Fourth avenues; also all those parts of Eightieth, Eighty-First, Eighty-Second, Eighty-Third, Eighty-Fourth and Eighty-Fifth-streets lying between the Sixth and Seventh avenues, as the same are laid out and designated on the map or plan of the city of New-York, are hereby discontinued on the said map or plan.

SEC. 2. The Fourth avenue shall be continued and extended on the said map or plan from Sixty-Sixth-street to Sixty-Eighth-street. Also Avenue A and the First, Second, Third and Fourth avenues shall be respectively continued and extended on the said map or plan from One Hundred and Sixth-street to One Hundred and Ninth-street. Also One Hundred and Seventh and One Hundred and Eighth-streets shall be respectively continued and extended on the said map or plan from the Fifth avenue to the Harlaem river. And the owner or owners of the lands and tenements which shall be included in any blocks or plots of ground to be formed by such extension and continuation of the said avenues and streets, respectively, shall have, hold, occupy, possess and enjoy the same, in like manner as he, she or they would have been entitled to do if the said avenues and streets had been originally so extended and continued on the said map or plan; and whenever the said avenues or streets, or any or either of them, shall be opened, the damage and benefit shall be estimated, assessed and paid, in like manner as the same would have been done if the said avenues and streets had been originally so extended and continued.

SEC. 3. All that part of the Fourth avenue in the city of New-York, lying between Thirty-Fourth-street, and the Harlaem river, shall be widened on the map or plan of the said city, by adding thereto, on each side thereof, twenty feet of land, so as to make the whole width of that part of the said avenue one hundred and forty feet.

SEC. 4. The said part of the Fourth avenue so to be widened is hereby declared to be one of the avenues of the city of New-York in like manner and with the like effect as if the same had been so laid out by the commissioners appointed in and by the act, entitled "An act relative to improvements touching the laying out of streets and roads in the city of New-York, and for other purposes," passed April 3d, 1807.

CHAP. 143.

AN ACT to amend an act entitled "An act relating to the New-York and Harlem Railroad Company," passed May 7, 1840, and the acts amending the same.

Passed March 29, 1848.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * *

Sec. 6. The New-York and New-Haven Railroad Company is hereby authorized to enter upon and run their cars and engines for passengers, freights, mails, expresses and other business, over the road of the New York and Harlem Railroad Company, from the point of junction of the roads of said companies at or near William's bridge, in the county of Westchester, to the city of New-York, and as far into said city as the said Harlem railroad may extend, upon such terms and to such point as has been or may hereafter be agreed upon by and between said companies; a copy of such agreement or agreements to be duly authenticated and filed in the office of the secretary of state of this state; and to take, transport and convey persons and property upon the said Harlem railroad, by the power and force of steam or animals or any mechanical power or combination of the same.

CHAP. 387.

AN ACT to extend the charter of the New York and Harlem Railroad Company, and to determine the mode of using the same in the streets of New York.

Passed April 16, 1859.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem Railroad Company are hereby authorized, pursuant to the ordinance of the mayor, aldermen and commonalty of the city of New York, passed December twenty-seventh, eighteen hundred and fifty-eight, and approved December thirty-first, eighteen hundred and fifty-eight, to lay down a double track or railway from their track in the Fourth avenue, at Forty-second street, up said street to Madison avenue, and up Madison avenue to Seventy-ninth street, for the use of their small cars only.

SEC. 2. The New York and Harlem Railroad Company is hereby authorized, empowered and permitted to use steam in the drawing of their passenger and freight cars, upon their railroad on the Fourth avenue, to and from the northern extremity of Manhattan or New York island, to the south side of Forty-second street, in said city, with turnouts to their en-

gine-houses, respectively, for a period of thirty years from the thirty-first day of December, eighteen hundred and fifty-eight.

SEC. 3. All the rights, privileges and franchises given and granted to the New York and Harlem Railroad Company, in and by their act of incorporation, passed April twenty-fifth, eighteen hundred and thirty-one, and the several acts amending the same, subject to all the restrictions imposed by said several acts, except as herein modified, are hereby extended for the term of thirty years from the passage of this act. Nothing in this act shall be construed to prevent the legislature at any future time from rescinding, altering or amending this act, or the privileges hereby granted.

SEC. 4. This act shall take effect immediately.

CHAP. 880.

AN ACT for the protection of persons traveling upon Fourth avenue, in the city of New York.

Passed May 10, 1867; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem railroad company shall within two years from the passage of this act, construct up to the grade of Fourth avenue, in the city of New York, a substantial stone or brick wall, with suitable coping upon each side of their road, upon a line not exceeding twenty-six feet in the clear at any point of measurement below the tunnel at Ninety-second street in said city, and from the north side of Seventy-ninth street to the south side of Eighty-eighth street, where the road bed or track is below the grade of the avenue, and where the same is not arched or covered, and shall also, within said period, erect upon said wall (except at street crossings, where bridges are, or shall be constructed) a substantial iron fence for the protection of persons using said avenue, said wall and fence to be so finished and constructed, as shall be approved by the engineer of the Croton aqueduct board. Said wall shall extend as high above the grade of the avenue as the said engineer shall direct, and the railing thereon shall be not less than three feet in height; and one-half of said wall in lineal feet shall be constructed within one year from the date of the passage of this act, and the balance in two years.

SEC. 2. Within two years after the passage of this act, The New York and Harlem Railroad Company shall construct and complete an arch of masonry work over the track of the road of said company, in the Fourth avenue of the city of New York, from the south line of Eighty-eighth street to and connecting with the rock cut so called on Ninety-second street, in the said city. The said arch shall be constructed of such ma-

terial, and of such thickness, and of such strength and in such manner in all respects as the engineer of the Croton aqueduct board shall prescribe. Whenever the said company shall have expended the sum of twenty-five thousand dollars in the prosecution of the said work, and shall produce to the comptroller of the city of New York the certificate of the said engineer to that effect, the said comptroller shall draw his warrant in favor of the said company upon the treasury of the said city, and deliver the said warrant to the said company for the sum of twelve thousand five hundred dollars, and so on from time to time as often as the said company shall have expended a like sum of twenty-five thousand dollars, and shall produce the like certificate of the said engineer, the said comptroller shall draw his warrant in favor of the said company and deliver it to the said company, upon the treasury of the said city for the like sum of twelve thousand five hundred dollars. And when the said company shall have fully completed the said arch to the full satisfaction and approval of the said engineer, and shall produce his certificate to that effect and of the last installment expended by the said company in the construction thereof to the said comptroller, the said comptroller shall draw his warrant in favor of the said company and deliver the same to the said company for one-half of the amount of such last installment. The said several warrants shall be paid out of any moneys in the treasury of the said city raised and appropriated for roads and avenues. The construction of the said arch shall be commenced on or before the first day of July next, and one-half thereof shall be completed in one year from the said first day of July next, and the balance in two years from the passage of this act. Nothing in this act contained shall be held or construed to oblige the said company to fill in and grade and level over and about the said arch, but filling in and grading and levelling over and about the same shall be done by the mayor, aldermen and commonalty of the said city.

SEC. 3. It shall be the duty of the city authorities of the city of New York, now vested with the power of regulating and grading the streets and avenues of said city, to regulate and put in good condition said avenue, and fill in the spaces behind said walls as rapidly as they shall be constructed by said railroad company.

SEC. 4. If the said railroad company shall fail to comply with any of the provisions of this act, they shall be liable to a penalty of two hundred and fifty dollars for each and every day said failure to comply shall continue, unless said engineer shall certify that said railroad company have used due diligence in prosecuting said work, which penalty, with costs, shall be sued for by the district attorney of the county of New York, in the name of the people of the State, in any court of

record in said county, and which penalty, when recovered, shall be paid by said district attorney, as follows: one-half of said penalty to the informer, and the other half to the commissioners of charities and corrections, to be used by them in such manner, for the benefit of the persons under their charge, as they shall deem best.

SEC. 5. Nothing in this act contained shall be construed as in any manner extending or increasing the rights of said railroad company, or as depriving the common council of the city of New York of any powers now possessed by it, except as specially herein provided.

SEC. 6. The legislature may at any time amend or repeal this act.

SEC. 7. This act shall take effect immediately.

CHAP. 702.

AN ACT to improve and regulate the use of the Fourth avenue in the city of New York.

Passed May 14, 1872; three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem Railroad Company is hereby authorized and required to regulate the grade of their railroad in the Fourth avenue of the city of New York, and to construct such viaducts, foot and road bridges over the same, and such excavations and tunnels under the same, with openings for proper ventilation, for the purpose of rendering the same safe and convenient to any persons crossing the same, and the railroad trains and passengers traveling thereon, in the following manner, namely: At Forty-fifth and Forty-eighth streets, to construct tunnels under the said streets and the Fourth avenue for sidewalks and carriage ways underneath the railroad at least thirty-four feet wide, or bridges over the railroad of at least that width, for the same purpose, and at Forty-sixth, Forty-seventh and Forty-ninth streets tunnels under the said streets and the Fourth avenue, or bridges over the same, at least twelve feet in width, for foot passengers. Said tunnels or bridges shall have easy approaches, and the tunnels shall be dry and thoroughly ventilated and lighted. Between Forty-eighth and Forty-ninth streets the grade of the railroad shall commence to descend, and shall descend as rapidly as the operation of the road will permit, so that at Fifty-sixth street the grade of the railroad shall be thirteen feet six inches below the grade of the avenue; and from thence to Ninety-sixth street the road shall run through a covered way, with openings in the coverings not to exceed one hundred and fifty feet in length, and twenty feet in width in each block;

and thence continuing upon the present grade to the center of One Hundred and Fifth street, and thence descending at the rate of about forty feet to the mile to the center of One Hundred and Twentieth street, where the said grade shall be fourteen feet one inch below the grade of the avenue; thence descending at the rate of about twelve feet and four-tenth of a foot to the mile to the center of One Hundred and Twenty-ninth street, where said railroad grade shall be eleven feet below the grade of the avenue; thence ascending at the rate of twenty-six feet and four-tenths of a foot to the mile to the center of One Hundred and Thirty-third street to and upon the present grade of the railroad; the grade of said road at Fifty-ninth street shall not exceed fifteen feet six inches below the grade of the said avenue as established by law. At Seventy-fourth street it shall not exceed thirteen feet six inches, and at Seventy-ninth street shall not exceed twelve feet. At Fiftieth and Fifty-first streets, elevated bridges of iron for foot passengers shall be constructed over the railroad. Between Fifty-second and Fifty-third streets a bridge shall be constructed for foot passengers and carriages over the railroad, with approaches parallel with the railroad, and at Fifty-fourth and Fifty-fifth streets bridges of iron shall be constructed for foot passengers over the railroad; and from Ninety-eighth street to One Hundred and Fifteenth street, the railroad shall be carried upon a viaduct, with stone arches or iron bridges in said viaduct over the cross or intersecting streets above One Hundred and First street, to and include One Hundred and Thirteenth street. Between One Hundred and Seventeenth and One Hundred and Eighteenth streets, a bridge shall be constructed over the railroad with parallel approaches, the same as before provided between Fifty-second and Fifty-third streets; from One Hundred and Nineteenth street to One Hundred and Twenty-ninth street inclusive, iron bridges over the railroad shall be constructed upon the line of each street the full width of the street. At One Hundred and Thirtieth and One Hundred and Thirty-first streets, iron bridges for foot passengers shall be constructed over said railroad; between Forty-fifth and Forty-ninth streets, including said streets, iron railings or brick walls shall be erected in said streets, outside the railroad tracks, so as to prevent crossing at a level with said railroad tracks. A coping and iron railing shall be constructed upon the parapet and retaining walls along the said improvement, wherever the said roadway runs through an open cut, and also around the openings between Fifty-sixth and Ninety-six streets.

SEC. 2. During the progress of the work, the New York and Harlem Railroad Company is hereby authorized to lay down such additional temporary tracks on the Fourth avenue, above

Forty-second street, as may be necessary for the railroad business during the progress of the work, and such tracks shall be removed when the work shall be completed, and said company is hereby authorized, for the purpose of facilitating rapid transit and accommodating local traffic, to lay down permanently two additional tracks on said avenue, and to make such landings and excavations in said avenue as may be required for such additional tracks, with landings for the entrance and delivery of passengers outside of the said excavations and viaduct.

SEC. 3. Whenever it shall be found advisable or necessary to alter the grade of the streets crossing the said avenue or of the said avenue, where the said road shall pass through a covered way, the same may be done by said company, but so as not to interfere with the free use of the streets by the public.

SEC. 4. The sidewalks on Fourth avenue between Forty-ninth and Fifty-sixth streets, and between Ninety-sixth street and the Harlem river, shall not exceed fifteen feet in width.

SEC. 5. Whenever it shall be necessary in the progress of said work to remove or alter the Croton water pipes, sewers or gas pipes upon said avenue, the same shall be done by the department or corporation having charge thereof, so as not to interfere with said work.

SEC. 6. There shall be a board of engineers, whose duty it shall be to execute, direct and superintend the construction of the said improvement, to be called the board of engineers of the Fourth avenue improvement. It shall be the duty of the said board to file a monthly statement, under oath, of the items of their expenditure with the comptroller of the city of New York. Regular accounts of all their transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company, and to the comptroller of the city of New York. The said board are authorized to pass suitable by-laws for their own regulation and government, and to select a presiding officer and secretary from their own number. They shall keep a record of all their proceedings. The said board shall consist of four members, as follows, namely: Allan Campbell and Alfred W. Craven, or their successors, and the chief engineer of the board of public works of the city of New York for the time being, and the engineer of the New York and Harlem Railroad Company. In case of the death, removal or resignation of the said Campbell or Craven, or their or either of their successors, the vacancy shall be filled by the remaining members of the board. The said board are hereby authorized and directed to take the entire charge and control of the said improvement, and to execute the same in conformity with the provisions of this act, in a substantial

and workmanlike manner. The said engineers shall receive eight dollars each for every day that they shall be employed in the performance of their duties under this act. They may appoint one of their number as a general superintendent of the work. The said board shall prepare plans and specifications of said improvement in conformity with this act, and an estimate of the expense thereof, and file a copy of such plans, specifications and estimate in the office of the comptroller of the city of New York. The members of the said board, before entering upon the performance of their duties shall severally take and subscribe an oath or affirmation before some judge of a court of record in the city of New York, faithfully to perform the trust and duty required of them by this act and as a member of the said board of engineers, which shall be verified by such judge and filed in the office of the said comptroller.

SEC. 7. When the said plan, specifications and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company and the mayor, aldermen and commonalty of the city of New York in equal proportion as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work upon the said improvement that the sum of twenty-five thousand dollars has been expended thereon by the New York and Harlem Railroad Company, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of the said city, and delivered to the said railroad company for and on account of the one-half of the expense and cost of said improvement to be borne and paid by the said city as aforesaid.

SEC. 8. For the purpose of raising the sum or amount of one-half of the estimated expense and cost of the said improvement, to be borne and paid by the city and county of New York, one-half of the proportion or amount to be borne and paid as aforesaid, or one-fourth of the whole estimated expense and cost, shall be raised by a tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the year eighteen hundred and seventy-two, and the remaining sum or one-half of the proportionate amount to be borne and paid by the said city and county shall be raised in like manner and included in the tax levy for the year eighteen hundred and seventy-three. The comptroller of the city of New York is hereby

authorized and directed to issue revenue bonds of the said city, in anticipation of the amount to be raised by taxation for the expense and cost of the said improvement in each year, to provide the means for paying the said proportion of the said city toward the said expense and cost, before the said tax shall be collected, not to exceed the due proportion to be borne and paid by the said city in each of the said years eighteen hundred and seventy-two and eighteen hundred and seventy-three; such bonds to be issued and sold at not less than par. So much of the proceeds of the said tax for each of the said years as may be necessary for the purpose shall be applied to the payment of the revenue bonds to be issued as aforesaid. It is hereby intended and declared that the payments by the city of New York are to be made in the proportion and as fast as they are made by the said railroad company during the progress of the work on the said improvement.

SEC. 9. The mayor, aldermen and commonalty of the city of New York are forbidden to obstruct the said improvement or the use of the Fourth avenue for that purpose above Forty-second street; and the said municipal corporation is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said tunnel and railways shall be exclusively for the uses and purposes of said railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty, as such, with his agents, and assistants, to enter or pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of this corporation provided for that purpose, without the consent of said corporation, under penalty of fifty dollars for each offense, to be recovered by this corporation.

SEC. 10. The said board of engineers shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed the said railroad company are authorized and directed to run by steam their trains (and such trains of other railroads as shall have obtained the consent of the New York and Harlem Railroad Company) over the said improvement and the route of the said railroad, and in and upon their depot at Forty-second street, and the switches, turnout and sidings, now authorized by law, north of said street.

SEC. 11. The Legislature may at any time alter, amend, or repeal this act.

SEC. 12. This act shall take effect immediately.

CHAP. 339.

AN ACT to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes.

Approved by the Governor April 19, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as now established by chapter seven hundred and two of the laws of eighteen hundred and seventy-two, shall be changed and altered as follows: Commencing at or about One Hundred and Sixth street, the grade shall ascend going northwardly at the rate of forty feet per mile to One Hundred and Sixteenth street; and thence the grade shall descend, going northwardly, at the rate of twenty-four and seven-tenths feet per mile to One Hundred and Twenty-ninth street; thence still descending northwardly at the rate of twenty-nine and six-tenths feet per mile to a point about eighty feet southwardly from the present legally established bulkhead line on the south side of the Harlem river; thence going northwardly, the grade over the Harlem river shall be level at an elevation of twenty-six feet above high-water line of spring tides, to a point about eighty feet north of the present legally established bulkhead line, on the north side of the Harlem river; thence descending on a grade of not exceeding thirteen feet per mile to a point twenty feet south of the south line of One Hundred and Thirty-eighth street; thence still descending northwardly on a grade of not exceeding thirty-seven feet per mile to the south line of One Hundred and Forty-fourth street; thence still descending on a grade not exceeding twenty-nine feet per mile to the level of the roadbed of the New York and Harlem railroad, as now legally established and constructed, at or about the south line of One Hundred and Forty-ninth street.

SEC. 2. The viaduct structure, as it now exists between One Hundred and Sixth and the south side of One Hundred and Eleventh streets, shall be adapted to the new grade line as established by the preceding section, by raising its parapet

walls, and filling in with earth or other materials between the same, to the height required by the new grade; and from the south side of One Hundred and Eleventh street to the Harlem river, the railroad tracks and roadbed shall be carried on a viaduct structure of iron or steel, or of both of these materials combined, consisting of three lines of plate girders, supported on columns of iron or steel, standing on suitable pedestals of stone or brick masonry, with foundations under the same of timber piling, or concrete, as may be found necessary.

SEC. 3. The present depressed cut of the railroad, extending from One Hundred and Fifteenth street to One Hundred and Thirty-third street shall be filled in with earth or other suitable material, and its parapet walls taken down below the line of the under side of the avenue paving; and the bridge which now carries One Hundred and Sixteenth street, the roadway between One Hundred and Seventeenth and One Hundred and Eighteenth streets, the bridges which carry one Hundred and Nineteenth, One Hundred and Twentieth, One Hundred and Twenty-first, One Hundred and Twenty-second, One Hundred and Twenty-third, One Hundred and Twenty-fourth, One Hundred and Twenty-fifth, One Hundred and Twenty-sixth, One Hundred and Twenty-seventh, One Hundred and Twenty-eighth and One Hundred and Twenty-ninth streets over the said depressed cut, also the foot bridges over the same at One Hundred and Thirtieth and One Hundred and Thirty-first streets shall be removed, and the space between the exterior lines of the said parapet walls shall form a part of Park avenue, and be paved with stone paving of the same character and description as Park avenue is now paved, and shall be laid in accordance with the grades of Park Avenue, as now established, and the iron bridges which now carry the railroad tracks over One Hundred and Twelfth and One Hundred and Thirteenth streets shall also be removed, or be raised to the new grade line.

SEC. 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Twelfth street to the Harlem river, shall be passed over with a clear height of not less than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred aud Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section.

SEC. 5. The supporting columns of the new viaduct structure shall divide it into spans of about sixty-five feet center to center longitudinally with the railroad and be disposed in groups of three transversely at right angles, one column on the center line of the railroad, and one column on each side of said center line at a distance not to exceed twenty-eight feet each way between the center of said columns, excepting that at the crossings of One Hundred and Sixteenth and One Hundred and Twenty-fifth streets, and the exterior street (being one hundred feet in width) columns may be erected on the center line of said streets and also on the curb lines; and the said columns shall not exceed twenty-four inches by twenty-four inches of extreme external diameter above the level of the street pavement and shall be protected at their bases on the pavement with circular cast-iron wheel guards of sufficient diameter to defend the shafts of said columns from abrasion.

SEC. 6. The railroad tracks shall be carried on a solid tight floor, and the drainage water shall be conducted by pipes into the sewers.

SEC. 7. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, is hereby authorized and permitted, at its election, to erect station-houses on both sides of the railroad at One Hundred and Twenty-fifth street, with platforms extending from the north line of One Hundred and Twenty-fourth street to the south line of One Hundred and Twenty-sixth street; and for the support of the girders to sustain such stations and platforms, columns may be erected along the curb lines of Park avenue, between One Hundred and Twenty-fourth and One hundred and Twenty-Sixth streets, and on the curb lines of One Hundred and Twenty-fifth street east and west of Park avenue as may be necessary, the said station columns not to exceed fifteen inches square in size above the surface of the pavement. The said stations and platforms shall be reached by stairs not less than five feet in width, which shall terminate on the side-walk pavement on both sides of One Hundred and Twenty-fifth street, east and west of Park avenue, and also upon the pavement on both sides of Park avenue adjacent to the north line of One Hundred and Twenty-fourth street and the south line of One Hundred and Twenty-sixth street. The station-houses may be built over the roadway of One Hundred and Twenty-fifth street, and may be of a length equal to the distance between the curb lines of the same.

SEC. 8. The Harlem river shall be crossed by the four tracks of the said railroad on a pivot draw-bridge, the center of which shall coincide with the center of the draw-bridge now standing, but the new bridge shall be so built that the lowest part of its structure shall have a clear height of twenty-four feet above

high water of spring tides, and shall provide passageway for vessels on both sides of the center pier, each of one hundred feet width in clear, measured at right angles to the axis or current of the river at the point of its passage under this bridge; the extreme ends of the draw-bridge shall be sustained on abutments of stone masonry, and a protection pier of proper width, to effectually protect the structure of the draw-bridge, when swung open for the passage of vessels, may be built in the river on a line parallel with the direction of the current of the river, no part of which, however, shall in any way diminish the clear width of one hundred feet passageway on both sides of the same.

SEC. 9. From the north abutment of the Harlem river bridge the new grade of the railroad shall be carried on a viaduct structure consisting of parallel retaining walls of stone masonry, with earth filling, to the south side of One Hundred and Thirty-eight street, with suitable openings for the passage of One Hundred and Thirty-fifth street and Mott avenue; over which streets the railroad shall pass on bridges of iron or steel supported on stone abutments; the railroad tracks shall be carried over One Hundred and Thirty-eight street on a bridge of iron or steel, of one hundred feet in width, divided into three spans consisting of one clear span over the roadway between the curb lines, and with side spans over each of the sidewalks supported on stone masonry abutments built upon the north and south lines of said street, and by iron columns on the curb lines.

SEC. 10. In order to secure fourteen feet clear of headroom under the lowest part of the bridge carrying the railroad tracks over One Hundred and Thirty-eight street, the grade level of One Hundred and Thirty-eight street as now established, shall be altered and be depressed under the said bridge, one and one-half feet, and the bridge which now carries One Hundred and Forty-fourth street over the depressed tracks of the New York and Harlem railroad may be raised to a height not exceeding seven and one-half feet above its elevation as now constructed, and the grades of the streets and avenues forming the approaches to the said bridge, that is to say, on One Hundred and Thirty-eight street between Mott avenue and Railroad avenue, and on One Hundred and Forty-fourth street eastwardly and westwardly from the railroad bridge, and on Railroad avenue northwardly and southwardly from One Hundred and Forty-fourth street, shall be altered and changed to correspond with the depression of One Hundred and Thirty-eighth street grade, and the raising of One Hundred and Forty-fourth street bridge, in such manner as may be prescribed by the municipal authorities having jurisdiction in the premises.

SEC. 11. North of the north abutment of One Hundred and

Thirty-eighth street bridge to One Hundred and Forty-ninth street the roadbed of the railroad may be raised to its new grade level by filling of earth, or in any other way, at the discretion of the railroad company.

SEC. 12. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, during the making of the change in the elevation of the aforesaid structure and bridge is authorized to construct a temporary bridge over the Harlem river and to maintain such temporary structures as may be found necessary for the operation of its road, and to occupy any part or parts of any public streets or avenues in the city of New York necessary for such purposes, all of which, however, shall be done under the approval, direction and sanction of the board hereinafter appointed.

SEC. 13. There shall be a board whose duty it shall be to execute, direct and superintend the construction of the said improvement from One Hundred and Sixth street to the line of the Harlem river or point at which the new bridge over the Harlem river, authorized by this act to be constructed, shall commence, which board shall be called "The Board for the Park Avenue Improvement above One Hundred and Sixth Street." It shall be the duty of the said board to file a monthly statement under oath of the items of its expenditures with the comptroller of the city of New York. Regular accounts of all its transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company and to the comptroller of the city of New York. The said board is authorized to pass suitable by-laws for its own regulation and government, and to select a presiding officer and secretary from its number. It shall keep a record of all its proceedings. The said board shall consist of five members, to be appointed by the mayor of the city of New York, two of whom shall be civil engineers experienced in railroad and bridge construction. In case of the death, removal or resignation of any member of the said board, or their or either of their successors, the vacancy shall be filled by appointment by the mayor of the city of New York. The said board is hereby authorized and directed to take the entire charge and control of the said improvement from One Hundred and Sixth street to the line of the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act, to be constructed shall commence, and to execute the same in conformity with the provisions of this act, in a substantial and workmanlike manner. Such work shall be done, so far as possible, by contract. Advertisements shall be made as the board shall direct, for bids or proposals for the work proposed from time to time to be contracted, and the contracts

shall be awarded to the lowest responsible bidder who shall be approved by the board. The contractors shall be required to give such bonds for the faithful performance and execution of the work as the said board shall require. Each member of the board shall receive ten dollars for every day that he shall be employed in the performance of his duties under this act. The board may appoint one of its number as a general superintendent of the work. The said board shall prepare plans of said improvement in conformity with this act, which when approved by the commissioner of public works shall be filed in the office of the comptroller of the city of New York. The said board shall also file with the comptroller specifications and an estimate of the cost of said work. The members of the said board before entering upon the performance of their duties, shall severally take and subscribe an oath or affirmation before a judge of a court of record of the city of New York, faithfully to perform the trusts and duties required of them by this act and as a member of the said board, which oath shall be filed in the office of the comptroller of the city of New York. All work to be done upon or under any street, between One Hundred and Sixth street and the south line of the Harlem river shall be done under the supervision of the department of public works, and the commissioner of public works shall appoint necessary inspectors and engineers for the supervision of such work, who shall be paid a reasonable compensation to be included in the cost of said improvement.

SEC. 14. When the said plan, specification and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad company for and on account of the one-half of the

expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of said improvement to be paid by the city of New York, exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company.

SEC. 15. For the purpose of raising the sum or amount of the cost of the said improvement to be borne and paid by the city of New York, it shall be the duty of the comptroller and other proper officers of the city of New York to borrow, from time to time, by the issue of bonds, bearing such rates of interest as they may deem proper, not exceeding four per centum per annum, payable semi-annually, such sums as may be necessary to pay the one-half part of all amounts called for by the certificates of the superintending engineer provided for in the preceding section of this act. Such bonds shall be known as assessment bonds for the Park avenue improvement above One Hundred and Sixth street. Such bonds shall be issued by the comptroller, when authorized by the board of estimate and apportionment, at not less than par, for such period as said comptroller may determine, not exceeding five years. Such bonds shall be sold by the comptroller by inviting proposals therefor by public advertisement for not less than ten days, and the same shall be awarded to the highest bidder therefor, and said proposals shall be only publicly opened by the comptroller in the presence of the commissioners of the sinking fund, or such of them as shall attend at the time and place specified in the advertisement therefor. The comptroller with the approval of said commissioners, shall determine what, if any, of such proposals shall be accepted, and upon the payment into the city treasury of the amounts due by the persons whose bids are accepted respectively, certificates therefor shall be issued to them as authorized by law.

SEC. 16. Upon the completion of such work and final payment by the comptroller of the proportion of the cost of said improvement to be borne by the city of New York, the mayor, aldermen and commonalty of the city of New York by the counsel to the corporation of said city, is hereby authorized and directed to make application to a special term of the supreme court in and for the first department, for the appointment of commissioners of assessment, and the said court shall thereupon name three discrete and disinterested persons, being citizens of the city of New York, as such commissioners of assessment, for the purpose of performing the duties herein-

after mentioned in that behalf prescribed. Twenty days' notice of such applications shall be published in the City Record and in at least two other newspapers published in the city of New York. Upon the appointment of said commissioners, they shall severally take and subscribe an oath or affirmation before some officer authorized to administer oaths, faithfully to perform the trusts and duties required of them by this act, which oaths shall be annexed to and filed with their report. In case of the death, resignation or refusal to act of any such commissioner of assessment, it shall and may be lawful for the court aforesaid, or any one of the justices thereof, on the application of the mayor, aldermen and commonalty of the city of New York as often as such event shall happen, to appoint a discreet and disinterested person, being a citizen of the city of New York, as such commissioner of assessment in the place and stead of such commissioner so dying, resigning or refusing to act, and the surviving or acting commissioners, as the case may be, shall have full power to proceed in the execution of their duties under their appointment until a successor of such commissioner so dying, resigning or refusing to act shall be appointed. It shall be the duty of said commissioners to view the improvement provided for by the terms of this act from One Hundred and Sixth street north to the Harlem river, and all such lands, tenements, hereditaments and premises as they may ultimately include within the area of assessment that may be fixed and determined by them, and shall proceed to determine the area upon which an assessment shall be imposed sufficient to meet and pay the entire amount of the assessment bonds which may be issued in pursuance of the provisions of section fifteen of this act, together with interest on such bonds to the date of the levying of such assessment, or such portion of said bonds and interest as the said commissioners of assessment shall determine should be paid by assessment. It shall and may be lawful to and for the said commissioners of assessment in their discretion, if they deem it equitable and just so to do, but not otherwise, to assess the whole or any part of the said bonds and interest upon the mayor, aldermen and commonalty of the city of New York. Any area of assessment shall be made so as to include all such lands, tenements, hereditaments and premises as may by said commissioners be deemed to be benefited by the said improvement, and no others; and having fixed such area and the amount of said bonds, and the interest thereon to be paid by assessment, it shall be the duty of the said commissioners to make a just and equitable assessment of the benefit to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises included within the said area or assessment.

In each and all and every case and cases where owners or parties interested, or their respective estates and interests are unknown or not fully known to the said commissioners, it shall be sufficient for them to estimate and to set forth and state in their report in general terms the respective sums to be paid, without specifying the names of the estates or interests of such owners, proprietors or parties interested, or either of them. On the coming in of the said report, signed by said commissioners, or a majority of them, the said supreme court shall, by order, upon the application of the mayor, aldermen and commonalty of the city of New York, after hearing any matter which may be alleged against the same, either confirm the said report in whole or in part, or refer the same back to the same commissioners for revisal or correction, or to new commissioners to be appointed by the said court to reconsider the subject-matter thereof, and the said commissioners to whom the said report shall be so referred shall return the said report corrected and revised, or a new report to be made by them as aforesaid in the premises, to the said court, without unnecessary delay; and the same, on being so returned, shall be confirmed or again referred back by the said court as justice shall require; and such report, when confirmed by the said court, shall be final and conclusive as well upon the said mayor, aldermen and commonalty of the city of New York as upon the owners, lessees, persons or parties interested therein and entitled to the lands, tenements, hereditaments and premises mentioned in the said report, and also upon all other persons whomsoever.

SEC. 17. The said commissioners of assessment, at least thirty days before they present their report to the supreme court, shall deposit a true copy or transcript of the same in the office of the comptroller of the city of New York, for the inspection of whomsoever it may concern, and shall give daily notice, by advertisement in the newspapers mentioned in the sixteenth section of this act, for thirty days after depositing such report as aforesaid, of the said deposit thereof in the said office, and of the day on which such report will be presented to the said court; and any person or persons whose rights may be affected thereby and who may object to the same or any part thereof, may, within thirty days after the first publication of such notice, set forth their objections to the same in writing to the said commissioners, who shall, after hearing the parties so objecting, thereupon reconsider their said assessment or part or parts thereof so objected to, and in case the same shall appear to them to require correction, and not otherwise, they shall and may correct the same accordingly. The said commissioners shall include in said report the amount of their fees, and all costs and disbursements for expenses, for surveys, maps and other things.

SEC. 18. In each and every case of the appointment of commissioners under this act, it shall be competent and lawful for any two of such commissioners so appointed as aforesaid, to proceed and to execute and perform the trusts and duties of their said office, and their acts shall be as valid and effectual as the acts of all the commissioners so to be appointed, if they had acted together, would have been; and further, in all cases, the acts, proceedings and decisions of a major part of such of the commissioners as shall be acting in the premises shall be as binding, valid and effectual, as if the said commissioners appointed for such purpose had all concurred and joined therein. The commissioners appointed under and by virtue of this act, who shall enter upon the duties of their appointment, shall each be entitled to receive such compensation as shall be awarded by the court upon the confirmation of their respective reports, not exceeding ten dollars for each day they shall respectively be actually employed in the duties of their appointment, besides all reasonable expenses to be taxed and allowed by said court for maps, surveys, clerk hire and all necessary expenses and disbursements, and the same shall be included in and considered and paid as part of said assessment.

SEC. 19. The respective sums so as aforesaid assessed by the said commissioners upon the owners and occupants and parties seized or possessed of or interested in the lands, tenements, hereditaments and premises mentioned in the report of said commissioners, and reported by said commissioners as and for the payment to be made by the parties and persons respectively in the said report mentioned or referred to, and intended as owners and proprietors of or parties interested in lands and premises deemed to be benefited for the benefit and advantage to be derived from the said improvement, shall be a lien or charge on the lands, tenements, hereditaments and premises in the said report mentioned, or upon the estate and interest of the respective owners, lessees and parties interested in said lands, tenements, hereditaments and premises, for or on account of which the said respective sums shall be so assessed by said commissioners upon the respective owners and proprietors thereof, and parties interested therein; as well the said owners and proprietors thereof and parties interested therein, and also the occupants, and each and every of them, shall, moreover, be respectively liable to pay on demand the respective sum or sums or assessments mentioned in said report at which the respective lands, tenements, hereditaments and premises so owned and occupied by him, her or them, or wherein he, she or they are interested, or at which the owners or proprietors thereof shall be so assessed, to such person or persons as the comptroller of the city of New York shall appoint to receive the same. The said respective sums or

assessments, with lawful interest from the date of the confirmation of the report, may be collected, with all costs and charges by action of the said mayor, aldermen and commonalty of the city of New York from and against the parties assessed, or the owner or owners of the respective lands, tenements, hereditaments and premises whereof or in respect of which the same may be assessed or set forth in the said report of the said commissioners, or from or against any or either of the said parties or owners without joining any other or others of them, the said parties or owners.

SEC. 20. The moneys collected pursuant to the provisions of sections sixteen, seventeen, eighteen and nineteen of this act shall be set apart, when collected, as a trust fund, to apply to the redemption of the principal and interest of the bonds for the payment of which said assessment shall have been imposed. In the event that the said commissioners of assessment shall have, in pursuance of the provisions of section sixteen of this act, assessed the payment of the whole or any part of said bonds upon the mayor, aldermen and commonalty of the city of New York, the funds to pay the same shall be raised by tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the years in which the said bonds shall fall due. The interest on all of the said bonds shall be paid by the city of New York until the same shall fall due, and the amount thereof shall be raised from year to year, by tax upon the real and personal property subject to taxation in the city and County of New York but any interest that may accrue upon the aforesaid trust fund shall be applied in payment of said interest, and from the time that said trust fund shall be established, the balance of the interest only over and above the amount that may be earned from said trust fund shall be raised by taxation as aforesaid.

SEC. 21. The new bridge over the Harlem river, authorized to be constructed, by the provisions of this act, and the approaches to such bridge authorized to be constructed on the north side of the Harlem river in the twenty-third ward, shall be constructed at the sole expense of the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company. The said railroad company shall prepare plans and specifications of said bridge and its approaches on the north side in the twenty-third ward in conformity with this act, and file a copy of such plans and specifications in the office of the comptroller of the city of New York. The said corporation is authorized and empowered to conform the structure of the said bridge to such plans and directions as shall be approved and given by the secretary of war, pursuant to authority conferred upon him by act of con-

gress, and except so far as the structure of said bridge shall be subject to the direction of said secretary of war, the plan therefor, and the approaches thereto on the north side in the twenty-third ward, shall be approved by the board appointed in pursuance of the provisions of this act.

SEC. 22. All changes in the railroad necessary to conform the grade thereof on the north side in the twenty-third ward, when elevated as aforesaid, to the new elevation, are hereby authorized and directed, and all grades of the said railroad established by any prior act or acts, or by any contract made by the railroad company owning, or leasing and operating said railroad, or by both, with any public department of the city of New York, or with the city of New York, pursuant to any act of the legislature, are hereby changed to conform to the provisions of this act.

SEC. 23. All bridges over the New York and Harlem railroad required to be made by any act or contract pursuant to any act of the legislature of the state of New York which will be interfered with by the change in grade of said railroad required by the provisions of this act, are hereby authorized to be removed except the bridge at One hundred and Forty-fourth street, which is authorized to be raised as aforesaid, and the obligation to make and continue the same, as imposed by any act or part of any act, or by any contract made pursuant to any act of the legislature of the state of New York, is hereby removed and annulled, anything in any act of the legislature of the state of New York, or in any contract made pursuant to any act of the said legislature of the state of New York, with any public department of the city of New York, or with the city of New York, to the contrary notwithstanding.

SEC. 24. The mayor, aldermen and commonalty of the city of New York, is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said improved structure and bridge shall be exclusively for the uses and purposes of the railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty as such, with his agents, or assistants, to enter or pass upon or through the same or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for that purpose, without the consent of said corporation, under a penalty of fifty dollars for each offense, to be recovered by said railroad corporation.

SEC. 25. The cost of the construction of all stations upon said railway, whether provided for in this act or not, shall be borne by the said railroad corporations or either of them, and shall not be included in the estimate to be made by said board of the cost of the proposed improvement from One Hundred

and Sixth street to the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act to be constructed, shall commence.

SEC. 26. Said board shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed, the New York and Harlem Railroad Company and its lessee, the New York Central and Hudson River Railroad Company so long as it remains such lessee, are authorized and directed to run by steam their trains and such trains of other railroad companies as shall have obtained permission therefor voluntarily given by either one of said companies which may be operating said railroad, over the said improvement and the route of the said railroad, and in and upon the depot at Forty-second street, and the switches, turnouts and sidings now authorized by law north of said street; and no trains of other companies, without such permission, shall be run thereon.

SEC. 27. The board appointed pursuant to the provisions of this act shall act upon any and all questions by a majority vote of its members.

SEC. 28. This act shall take effect immediately.

CHAP. 548.

AN ACT to amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety two, entitled "An act to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets under the railroad structure of the New York and Harlem railroad company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes."

Became a law May 8, 1894, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section four of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two is hereby amended to read as follows:

SEC. 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Eleventh street to the

Harlem river, shall be passed over with a clear height of not less than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred and Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section.

SEC. 2. Section fourteen of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two is hereby amended to read as follows:

SEC. 14. When the said plans, specifications and estimate shall be made and filed as aforesaid, or when any amended plans, specifications and estimate authorized by law shall be so filed, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad company for and on account of the one-half of the expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of the said improvement to be paid by the city of New York exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, except, nevertheless, that the mayor, aldermen and commonalty of the city of New York shall also bear and pay, in the manner in the act hereby amended

provided for, one-half of the expense of all work made necessary and done pursuant to any amended plans and specifications made and filed as provided for by this amendment to said act, in excess of the cost and expense of constructing or carrying out the said improvement in accordance with the plans and specifications heretofore made and filed; and the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, shall bear and pay, in the manner in the act hereby amended provided for, the remaining one-half of the said cost and expense; and the certificates of payment by either of said railroad companies, in this section hereinbefore provided for, to be made by the superintending engineer of said improvement, duly certified to by the aforesaid board, to cover any expense or cost that may be made necessary by any such amended plans and specifications, shall state the fact that the expense and cost in the said certificate specified was made necessary by such amended plans and specifications, and said certificates shall be conclusive evidence of such fact. But nothing herein contained shall be construed to obligate the city of New York to pay as its share of the work done under such amended plans and specifications a greater sum than fifty thousand dollars of such additional expense.

SEC. 3. In addition to the powers conferred upon the board for the Park avenue improvement above One Hundred and Sixth street, by chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, the said board may, at any time within three months after the passage of this act, amend the plans, specifications and estimates of that part of the said improvement between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street, so that the space between the exterior lines of the retaining walls of the present railroad structure and between the south line of One Hundred and Eleventh street and the south line of One Hundred and Fifteenth street shall form a part of Park Avenue, and be paved as provided in section three of said chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, and such amended plans, when approved by the commissioner of public works, shall be filed in the office of the comptroller of the city of New York. In such case the said board shall also file with the comptroller amended specifications of said work between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street in accordance with such amended plan; and an amended estimate of the cost of the entire work between One Hundred and Sixth street and the Harlem river, according to such amended plans and specifications. Upon the filing of such amended plans, specifications and estimate, the plans, specifications and estimate

heretofore made and filed shall be deemed to be amended accordingly. And the said board is hereby authorized, without advertisement, to make such supplemental contract or contracts, or such contract or contracts modifying any contract or contracts heretofore made by the said board with any contractor or contractors for any part of the work between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street, as may be necessary, in order to have the said work done in accordance with such amended plans, specifications and estimate. Nothing herein contained shall authorize the said board to change the grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as fixed and established by section one of chapter three hundred and thirty nine of the laws of eighteen hundred and ninety-two.

SEC. 4. This act shall take effect immediately.

CHAP. 594.

AN ACT to further amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, entitled "An act to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passing of intersecting streets under the railroad structure of the New York and Harlem Railroad company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes."

Accepted by the city.

Became a law May 13, 1896, with the approval of the Governor. Passed three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section seven of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, is hereby amended to read as follows:

SEC. 7. The New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized and directed, to erect and maintain a station at One Hundred and Twenty-fifth street, and for that purpose to erect and maintain a station building in Park avenue, extending from the north line of One Hundred and Twenty-fifth street to the south line of One Hundred and Twenty-sixth street, forty feet in width, with suitable stair-

ways on the easterly and westerly sides thereof, not exceeding five feet in width. The northerly and southerly center line of the said station building shall be the centre line of Park avenue. Suitable sidewalks and curbs shall be laid on each end and side of the said station building, and there shall be left a clear roadway, between the curb on the easterly side of Park avenue and the curb on the easterly side of the said station building and between the curb on the westerly side of the said station building and between the curb on the westerly side of Park avenue and the curb on the westerly side of the said station building, of twenty-six and one-half feet in width. For the purposes of the said station at One Hundred and Twenty-fifth street, the said viaduct structure shall be of such width as may be necessary for the construction and maintenance of suitable platforms and station buildings between the tracks, and for the necessary approaches to such platforms and station buildings, but not to exceed eighty-two feet in width, except that the cross girders to sustain such platforms, station buildings and approaches, may be supported on columns erected along the curb lines of Park avenue between One Hundred and Twenty-third street and One Hundred and Twenty-seventh street, the said columns not to exceed fifteen inches square in size above the surface of the pavement. Suitable stairways, not exceeding five feet in width, shall also be erected and maintained from the south side of One Hundred and Twenty-fifth street to the said platforms and station buildings between the tracks. The plan of the said improvement heretofore approved by the commissioner of public works of the city of New York and filed in the office of the comptroller of the city of New York on the twelfth day of November, eighteen hundred and ninety-two, as amended and modified by the plan approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, on the twenty-first day of June, eighteen hundred and ninety-four, is, and shall be deemed to be, hereby amended and modified to conform to the provisions of this section, and as so amended and modified, is hereby authorized, ratified and confirmed, and the said, the New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized to take down so much of the structure heretofore erected between One Hundred and Twenty third street and One Hundred and Twenty-seventh street in accordance with the said plan of the said improvement filed in the office of the comptroller of the city of New York, on the twelfth day of November, eighteen hundred and ninety-two, as is not necessary or required for the purposes of the station in this section provided for.

SEC. 2. This act shall take effect immediately.

CHAP. 613.

AN ACT relating to and to further amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, entitled "An act to regulate, improve and enlarge Park avenue above One hundred and Sixth street in The City of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes," as amended by chapter five hundred and forty-eight of the laws of eighteen hundred and ninety-four and by chapter five hundred and ninety-four of the laws of eighteen hundred and ninety-six, and transferring all the powers of "the board for the Park avenue improvement above One hundred and Sixth street" to the commissioner of highways of The City of New York on and after the tenth day of March, eighteen hundred and ninety-eight.

Accepted by the city.

Became a law April 29, 1898, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. On the tenth day of March, eighteen hundred and ninety-eight, "the board for the Park avenue improvement above One hundred and Sixth street" created pursuant to chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, shall deliver to the commissioner of highways of The City of New York all records, books, papers and maps in its office, or under its control, and upon the said tenth day of March, eighteen hundred and ninety-eight, the term of office of the said "the board for the Park avenue improvement above One hundred and Sixth street" and of each member thereof shall expire, and said board shall cease to exist on that day,

SEC. 2. From and after the said tenth day of March, eighteen hundred and ninety-eight, all the power and duties imposed or conferred upon the said "the board for the Park avenue improvement above One hundred and Sixth street" by the said act, or any amendment thereof, are hereby transferred to, and shall be devolved upon, and shall be performed by, the commissioner of highways of The City of New York.

SEC. 3. Nothing herein contained shall in any manner impair or affect any contract heretofore made by or with the said "the board for the Park avenue improvement above One Hundred and Sixth street," and any contract and all rights thereunder heretofore made by or with the said board, may be enforced in the name of "The City of New York" by the said commissioner of highways in the same manner and to the same extent that any such contract or any such rights thereunder might or could have been enforced by the said board under and pursuant to the provisions of the said act hereby amended or otherwise.

SEC. 4. Nothing herein contained shall relieve The New York and Harlem Railroad Company, or its lessee, The New York Central and Hudson River Railroad Company, from any costs, charges or expenses imposed upon the said railroad companies, or either of them, in and by the act hereby amended, or impose upon The City of New York any costs, charges or expenses not imposed by the said act hereby amended.

SEC. 5. This act shall take effect immediately.

Supreme Court.

THE PEOPLE *ex rel.* THE NEW YORK AND HARLEM RAILROAD COMPANY, *against* WILLIAM F. HAVEMEYER, Mayor of the City of New York. } 47 How. Pr. 494. September Term, 1874.

(495) WESTBROOK, *J.*: The New York and Harlem Railroad Company was created by a special act of incorporation, passed April 25, 1831, and various acts amendatory thereof and supplemental thereto, have since been enacted.

Prior to the passage of the act of 1872 (to enforce a duty devolved upon the respondent thereby, as is alleged, is the object of this application), the relator had located, constructed and operated a double-track railroad upon the Fourth avenue, in the city of New York. This was with the consent of the corporation of the city.

By chapter 387 of the Laws of 1859, entitled "An act to extend the charter of the New York and Harlem Railroad Company, and to determine the mode of using the same in the streets of New York," the corporation was "authorized, empowered and permitted to use steam in the drawing of their passenger and freight cars, upon their railroad on the Fourth avenue, to and from the northern extremity of Manhattan or New York Island to the south side of Forty-second street in said city, with turn-outs to their engine houses, respec-
(496) tively, for a period of thirty years from the 1st day of December, 1858."

Section 3 of the act just referred to "extended for the term of thirty years from the passage of this act, all the rights, privileges and franchises given and granted to the New York and Harlem Railroad Company, in and by their act of incorporation, passed April 25, 1831, subject to all the restrictions of the said act, except as herein modified."

Prior to the said act of 1859, the relator occupied the streets of New York with their railroad track, under a contract with the city, which bore date January 9, 1832. That contract enabled the common council of that city to determine when the railroad should become an obstruction and impediment to the enjoyment of the streets by the public, and to direct the railroad company to provide a remedy therefor under the penalty of the removal of its track.

When the Fourth avenue was originally occupied in part by the railroad, the sparseness of the population was such that such occupation gave but little inconvenience. As the city, however, expanded northward, it was found necessary to provide remedies for the danger and obstruction to the general public resulting from such occupation; and, with a view to a partial remedy, at least, by a law passed in 1867 (*chapter* 880), a portion of the avenue was arched over, leaving the railroad track below, at the joint expense of the city and the company. According to the evidence contained in the moving papers (and this is not denied), the completion of the work authorized by the act of 1867, was of great benefit; not only to the railroad company but to the city; so much so that it was deemed advisable to improve and grade the entire avenue, and, by means of sinking the tracks at points where it was practicable and bridging the avenue at others, to make the use thereof by the railroad company compatible with its proper use as a street by the public. To carry out this scheme the law of 1872, under which this proceeding is pending, was passed.

(497) By the first section of the act just referred to, the nature and character of the work which "the New York and Harlem Railroad Company is * * * authorized and required to" do is specified.

The second section authorizes the laying down of "such additional temporary tracks on the Fourth avenue, above Forty-second street, as may be necessary for the railroad business during the progress of the work;" and after providing for the removal of such temporary tracks when the work should be completed, it further authorized the company, "for the purpose of facilitating rapid transit and accommodating local traffic, to lay down permanently two additional tracks on said avenue, and to make such landings-excavations in said avenue as may be required for such additional tracks, with landings

for the entrance and delivery of passengers outside of the said excavations and viaduct."

By the sixth section, a board, to be called "the board of engineers of the Fourth avenue improvement," was created, to take charge of, manage and direct the work. It is made the duty of such board "to file a monthly statement, under oath, of the items of their expenditure, with the comptroller of the city of New York." By the same section, the members of the board are named, "Allen Campbell, Alfred W. Campbell, or their successors, and the chief engineer of the board of public works of the city of New York, and the engineer of the New York and Harlem Railroad Company"; directions are given for the keeping of minutes of their transactions; their compensation is fixed; provision is made to fill vacancies, and for the appointment of a general superintendent of the work. They are required to prepare plans and specifications of the improvement "and an estimate of the expense thereof, and file a copy of such plans, specifications and estimates in the office of the comptroller of the city of New York." And they were further required to take an oath, or affirmation, faithfully to perform their duties.

Section 7 provides that one-half of the cost of the work
(498) shall be borne by the New York and Harlem Railroad Company, and one-half by the city, as the work progresses, and, "when, and as often as it shall appear, by the certificate of the superintending engineer of the work upon said improvement, that the sum of $25,000 has been expended thereon by the New York and Harlem railroad (specifying the portions and divisions of the said improvement), when the said expenditure has been made the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of the said city, and delivered to the said railroad company for and on account of the one-half of the expense and cost of said improvement, to be borne and paid by the said city, as aforesaid."

Section 8 provides that the one-half of the estimated cost of the improvement which is to be borne by the city shall be raised by taxation upon the real and personal property, and one-half thereof shall be included in the tax-levy of 1872, and the other half in the tax-levy of 1873. The comptroller of the city is directed to issue revenue bonds to meet the amount to be paid by the city; and the section thus concludes: "it is hereby intended and declared that the payments by the city of New York are to be made in the proportion, and as fast as they are made by the said railroad company, during the progress of the work or the said improvement."

By the ninth section the city of New York is "forbidden to obstruct the said improvement, or the use of the Fourth avenue for that purpose, above Forty-second Street"; and the common council is "directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement."

By the tenth section the board of engineers is charged with completing the improvement as rapidly as possible, and when completed the New York and Harlem Railroad Company
(299) and such other companies as obtain from it a right so to do, are authorized to run trains, by steam, over the various tracks, &c.

After the passage of this act the relator proceeded, under the direction of the said board of engineers (which board has pursued each and every step required by the law to be taken) to make the improvement.

The city of New York raised by tax, including it in its tax-levy of 1872, one-quarter of the whole estimated cost of the improvement; and there was collected and paid into the treasury of the city, the sum of $1,580,767.50, to meet its share of the cost of the work.

By the act of April, 1873, payments by the corporation of the city of New York must be made through the proper disbursing officer of the department of finance, on vouchers, to be filed in said department, by means of warrants drawn on the chamberlain by the comptroller and countersigned by the mayor. Connected with the finance department is an audit bureau, which, under the supervision of the comptroller, is required to audit, revise and settle all accounts in which the city is concerned as debtor or creditor, the chief officer of which is called the auditor of accounts.

On the 14th day of May, 1874, a certificate, precisely in conformity with the provisions of the act under which the improvement is making, was made out by the superintending engineer, and delivered to the comptroller of the city of New York, certifying that $276,466.70 had been expended upon the improvement, specifying the portions and divisions of the same where the expenditure was made.

The auditor of the bureau of accounts (Abraham L. Earle) having duly examined the certificate, certified a claim for one-half thereof to the comptroller, which latter officer drew a warrant for one-half the amount of the certificate of the superintending engineer, to wit: for $138,233.35, and duly signed the warrant; which warrant was also countersigned by the mayor.

(500) After the mayor (William F. Havemeyer) had countersigned the warrant, which, as before stated, was also signed by the comptroller (Andrew H. Green) he caused his

name to be taken therefrom, and now refuses to countersign the same, though he has been requested so to do.

The money wherewith to pay the said warrant was then, and is now, in the treasury of the city, and the application by the relator is for a peremptory mandamus against the respondent, to compel him to countersign the said warrant.

No disputed question of fact arises upon this application; no question of fraud, collusion or attempt to cheat the city out of a dollar is urged. There is no pretense but that the board of engineers has honestly, conscientiously and impartially done its duty, and that the warrant drawn by the comptroller which the mayor now refuses to countersign, represents just one-half the money actually and judicially expended by the relator in making the improvement required by the law of 1872. On the contrary, the opposition to the mandamus is based upon three grounds only: First, that a mandamus is not the appropriate remedy; second, that the certificate includes the cost of temporary tracks for running trains during the progress of the work, and sundry other items which, though lawful and authorized by the statute of 1872, are not proper to be charged to the cost of the improvement, for one-half of which the city is liable; and, third, that the law is unconstitutional, for sundry reasons and on various grounds urged and stated upon the argument, and which will be noticed in detail hereafter.

The full statement of the facts, which has been given, readily shows that there is here no question of fact to be sent to a jury for trial, and therefore, no alternative mandamus need be granted. The amount of money due from the city has been adjusted, determined and ascertained by a tribunal specially organized and created for that purpose, and which, composed as it was of men of conceded integrity, ability and learning, acting under the sanctities of an oath, was infinitely
(501) better qualified to discharge that duty than any court or jury possibly could be. Unlike a court, which, to ascertain facts, must rely upon the evidence of others, this board had personal knowledge of the truth and right of their judgment, the work having been done under their supervision and according to their plans. Unless, then, this application must fail and be defeated for the objections taken and hereinbefore stated, there is no reason why this court should not and ought not to dispose of the whole case, as involving questions of law only, and, if its views coincide with the position of the relator, grant the writ asked for in a peremptory form.

The objection that a mandamus was not the proper remedy was argued preliminarily and disposed of prior to hearing the argument upon the merits. It may not be improper, however, as this case is one of great interest, to state, briefly, the reasons which influenced that decision.

Assuming the validity of the act of 1872, the doing the work, the honest expenditure of the money and all the facts set out in the moving papers (all of which must be assumed in disposing of this preliminary objection), a plain duty was imposed upon the respondent by the statutes of this state—one which was imperative and mandatory—the non-discharge of which worked gross wrong and injustice to the relator. No other remedy was adequate and proper to meet the case. The taxpayers, and all the officers of the corporation, other than the respondent, had faithfully and completely discharged their various duties. The money had been collected and paid into the city treasury, the auditor, under the direction of the comptroller, had certified to the justice of the claim; the comptroller had drawn his warrant for the amount, and the only obstacle to its payment was the want of a countersignature by the mayor, who (all this must be conceded in asking a refusal of the writ on this ground), without reason and without cause, declines to affix his name to a warrant, which the law declares he shall do. What other remedy will meet this case? Granting for the sake of argument, that
(502) an action could be maintained against the corporation, for labor performed and moneys expended, under the act (which, as the law specially provides for the ascertainment of the claim, the mode of raising the money and its payment, I do not believe), what propriety is there in subjecting the municipality of the city of New York, as well as the relator, to the cost and expense of an action at law, to enforce a claim which every tax-payer and officer thereof, except the mayor, desires to have paid, and has done all in his power to have discharged.

Within every principle which has ever been held upon the writ of mandamus, it must be the proper remedy. No other will reach the evil, and devolve the costs of the proceeding where they belong, if the points urged upon the merits do not justify the mayor in refusing to perform the official act.

The reasons which influenced us in holding that a mandamus is the appropriate remedy in this proceeding, are fully sustained in *The People agt. The Supervisors of Columbia County* (10 Wend., 263), and *The People agt. Mead* (24 N.Y., 114; *see pages* 120, 121, 122, 123). In the latter case, Judge Denio, in commenting upon some decisions which have been strenuously urged to this court, says: "But I do not think these cases are fully in point against the plaintiff. None of them present a case of a proceeding prescribed by statute for raising money by a local tax for the benefit of a class of creditors when that proceeding has been carried on according to law nearly to its completion, where it has proved effectual in raising the money from the tax-payers, who were the proper parties charged with

its payment, and when the only step wanting to produce satisfaction to the creditor is the payment of the money so raised into his hands. If the defendants are allowed to persist in refusing to make payment on the ground that the relator has a right of action against the town, the anomaly would be presented of the legal pursuit by a creditor of money owing by the town, which it had already raised and collected
(503) from the tax-payers and placed in the hand of a public officer for the purpose of being paid to its creditors — all in the performance of specific statutory directions—but when, in consequence of the perversity of the official person whose duty it was made to pay it over, it could not be obtained by the creditor." This is the exact course of argument which influenced us in overruling the motion to dismiss the proceeding upon the ground that the remedy asked for—a mandamus—was not the appropriate one; and with a single further citation from the same opinion of judge Denio, in which he comments upon the other case we have cited (*The People agt. The Supervisors of Columbia County*), we close the discussion of this preliminary objection: "If the opinion should be thought to go too far in denying the liability of the county to an action, still, the case is an authority for holding that when a particular method of raising money for local public purposes is prescribed by statute, the party entitled to receive it has a right to the full and perfect execution of the power conferred, which may be enforced by the writ of mandamus."

But it is further objected (and this objection goes to the merits of the application), that the certificate given by the superintending engineer, and for the one-half of which the comptroller of the city drew his warrant, includes items not properly chargeable under the act of 1872, to the cost of the improvement. If this objection be well taken, the amount of the illegal charges embraced in the certificate is of no consequence, and hence the application for a reference to ascertain the exact amount of such improper charges was refused. The certificate could only include such items as the law aforesaid authorized, and if it was made up in part of sums unauthorized, the application for the writ would be refused if such amount was great or small. The items objected to are: 1st. The cost of maintaining temporary tracks to run the trains whilst the work progresses; 2d. The necessarily enhanced cost of doing the work whilst a portion of the avenue is occupied by operating the railroad; and to obviate which it
(504) is claimed that the trains should have been stopped at the Harlem river. 3d. The construction of two additional tracks to secure rapid transit; and, 4th. The ten per cent., which in the estimate of the entire cost of the improvement,

is allowed for contingencies. In regard to the latter item, no part of it enters into the certificate for which the comptroller drew his warrant—that representing money actually expended. The appearance of this in the general estimate of the whole cost of the work made prior to the commencement of the undertaking was proper and usual, to apprise those interested of the possible amount of money required. It was placed where it was so that a sufficient sum might be raised to cover any expenditure which the proper performance of the work made necessary, and to make the fund, against which the certificates were thereafter to be given, adequate for their payment. As to the other items something further will be said.

To the second point—that the cost of the work is necessarily enhanced by the occupation of a portion of the avenue during its progress by the operation of the railroad thereon south of Harlem river, and which increased cost by reason thereof, is admitted—the act itself furnishes a sufficient answer, in plain terms. The second section authorizes the laying down of "such additional temporary tracks on the Fourth avenue above Forty-second street as may be necessary for the railroad business during the progress of the work. From this express permission the inference is irresistible that the work was to be carried on with the Fourth avenue occupied in part by the business of the railroad. The legislature evidently supposed, as we can readily conceive, that the city was vitally interested in the uninterrupted flow of its commerce through this as one of its great arteries, and that such uninterrupted flow was of more pecuniary consequence to it than the enhanced cost caused by its interruption. If allowed to judge of the soundness of this legislative opinion, we would cheerfully announce ours to be in accordance with theirs. But we are not, as the
(505) fundamental law of the state has wisely committed such considerations to the sound wisdom and practical sense of the legislative department of the government; and it would ill become the judicial branch to say that such discretion could be lodged anywhere with more propriety or more safety.

As to the other two objections—the cost of the temporary tracks and the two additional permanent tracks to secure rapid transit—we think that they are not well taken. The first five sections of the act designated the improvement to be made, and what may and should be done during its progress. Among these is the one which provides for doing the very things, to the imposition of one-half of the cost of which upon the city objection is made. It is impossible to separate these acts from the others which are directed to be performed. After the character, nature and extent of the work has been indicated in these five sections, the next (the sixth) creates the board of engineers, "to execute, direct and superintend the construc-

tion of said improvements," and then sections 7 and 8 prescribe the share of the cost of "the said improvement," which the city is to sustain, and direct how the money shall be raised and paid out to accomplish the object. No rule of construction would justify the limitation attempted upon the words, "the said improvement." All had been previously specified as a part thereof, or as *proper to be done* in connection therewith; and if the legislature had intended that the city should bear one-half the expense of only a part of the work previously authorized or directed, it would certainly have so declared, and not use an expression which must necessarily cover all.

Neither does this construction work so great injustice to the city as the learned counsel for the mayor argues. The legislature of the state (*The People agt. Kerr*, 27 N. Y., 188) had power to authorize the relator to occupy the Fourth avenue with its tracks, and prescribe the mode of occupation. The permission to run cars over it, drawn by steam power, had been expressly conferred in 1859. Whatever control the city
(506) had over its occupation by virtue of the contract with the company, was given to it by the law chartering the company. It was perfectly competent for the same body, under whose permissive authority the city acted, to deprive it of that power and deal directly with the relator. It did so by the act of 1859, which unconditionally conferred the right claimed by the railroad. Such permission was not, as the learned counsel for the mayor argued, subject to the restrictions imposed by other acts, under and by virtue of which the city had undertaken to control the corporation in the use of the avenue; but such restrictions existed only, as the act declares, "except as herein modified." The act having in prior parts made express provision for the laying down of tracks, and the running of cars thereon by steam, and that, too, with the consent of the city, as it expressly declares; such use, granted for a term of years in an unqualified manner, must be deemed to be at least one of the modifications referred to. When the act of 1872 was passed, the legislature had before it the situation and rights of both the city and the relator. The former was vitally interested in the success and maintenance of the latter. The iron rail and the steam horse, which linked it to the great country of which it was the commercial center, were as important and vital to its growth as any of its other avenues which its wealth and enlightened public spirit have constructed. The improvement of this avenue, so as to admit of its use by the public and the railroad together, and the apportionment of the cost thereof upon some just basis, were the problems to be solved. Much of the work to be done properly belonged to the city, and much to the railroad. A separation of the one from the other in its execution would enhance the cost of

it as a whole, even though the part properly belonging to each could be accurately designated. Under such circumstances the law was passed by which the work was to be prosecuted as a unit, under one plan and a single superintendence, while the cost was equally divided between the two. If a part
(507) of the whole can be selected and an argument based upon it to prove the city pays a part of something it ought not to bear, so, on the other hand, doubtless, the railroad company might argue, as to some other part, that it paid for something which benefited the city only. The truth is that the work so runs together that its separation is impossible; and since the propriety of its execution is conceded by all, the apportionment of its cost could only be made by the legislative power in the exercise of its best judgment. We think it has acted wisely, equitably and justly; but if it has not, neither this nor any other tribunal has power to correct its errors. The work, when completed, will certainly not benefit the railroad company only, but the city equally as much. The exact proportionate benefit which each will receive can never be accurately ascertained. It is enough to know that both will feel that the money expended has been judiciously employed, and a division made of its cost by a body empowered to decide that question.

Having endeavored to show that the remedy sought is an appropriate one, and that, if granted, the city will not pay anything unauthorized by the law of 1872, let us now examine the various objections founded upon our federal and state consitutions. It is claimed:

FIRST. That it violates the clause of our national constitution, forbidding any state to pass a law impairing the obligations of any contract. It is argued that as the contract of January 6, 1832, between the city and the company, gave to the former the right to control the use of the avenue by the latter, the act of 1872, which takes from the city this power of control, substantially abrogates this agreement. To this we answer: First, whilst discussing the previous objections, it was shown that the contract was annulled with the consent of the city, by the law of 1859, which definitely conferred the right to use the avenue by the propulsion of cars, over the tracks constructed upon its surface, by steam. This grant was
(508) absolute, and absolved the company from its contract of 1832, which had therefore ceased to exist when the present statute was passed; second, assuming that the old contract of 1832 was in force when the present statute was passed, it was competent for the city, if the old agreement was thereby improperly nullified, to make its objections. It, as a natural person, can waive its right, and assent to a change or modification of its bargains. Like a natural person, it cannot fold its arms and make no objection when it ought to speak.

It saw the machinery of the law being put in operation by an estimate of the cost of the work filed in the office of its chief financial officer, and in all that was done before the work began, and in the conduct of the same to the present time, one of its own principal officers (the chief engineer of the board of public works) took a leading and active part. No objection or notice is given to the relator that the provisions of the law are not in good faith accepted; on the contrary, it is allowed to make a contract, on the faith of a supposed acquiescence by the city, involving millions—the tax imposed is levied, collected and paid into the city treasury—hundreds of thousands of dollars are paid by the city in ratification of the new agreement which the law embodies; and now, at this late day, this objection is made after every tax-payer and every officer of the city—not even excepting the mayor, who is now objecting—has expressly ratified and confirmed it. So far as it is possible for any being, natural or artificial, to waive any prior agreement, if one existed, the city of New York has done so, and the point now, for the first time taken, cannot prevail. But, third, the city has no rights under the contract of 1832, so far as the use of this avenue by the relator is concerned, which the state was constitutionally bound to respect. The city, as we have shown under a previous point (*People agt. Kerr*, 27 N. Y., 188), had control over the occupation by the railroad of the street by the force of a power conferred. The body which gave it the power could withdraw it and exercise
(509) it for itself. It has done so, and that takes no inherent or vested right from the city.

SECOND. It is said that it violates section 16 of article 3 of the constitution of this state, which declares: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title." The title of the act is "An act to improve and regulate the use of the Fourth avenue in the city of New York." The cases of *Brewster agt. City of Syracuse* (19 N. Y., 116), and of *Ferdinand agt. Mayor*, (50 N. Y., 504), cover this objection. In the latter case it is decided, "if the title of an act fairly and reasonably announces the subject, and that is a single one, and if the various parts thereof have respect or relate to that subject, the provisions of the constitution that no local or private bill shall embrace more than one subject, and that shall be expressed in the title (*state constitution, art.* 3, Sec. 16), is complied with. The degree of relationship of each provision is not essential if it legitimately tends to the accomplishment of the general purpose." And it was also in that case further held, "the general subject of local improvements includes not only the plan and construction

of contemplated work, but the means by which the work may be accomplished, the proceedings necessary to be adopted for assessing and paying the expenses, and the remedies to parties for redress of grievances arising out of their construction." Tested by these rules there is no difficulty. When this law was passed, the public and the railroad company were in the joint use of this avenue, and the act declared by its title its object to be to "improve and regulate" its use. No improvement could be made without cost to some one, and the reader of such title would naturally conclude that a tax would be levied somewhere to pay such cost; and as the use was principally confined to the two corporations, it could reasonably be conjectured where it would fall. And further, as the public and the railroad were both using the avenue, the
(510) portion of the title which indicated that its use was to be regulated would naturally direct attention to the body of the act to ascertain how it was thereafter to be used. Every section of the act relates to this single object, and the title could not be made any more specific without incumbering it with the details of the machinery devised for its execution, which the framers of the constitution did not contemplate, and did not intend.

THIRD. It is further argued that the law is in conflict with section 13, article 7, of the constitution, which declares: "Every law which imposes, continues or revives a tax shall distinctly state the tax, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."

If this objection is to prevail, what becomes of all the various statute laws authorizing city and village corporations throughout the entire state to make local improvements, appoint boards to assess and determine the cost, &c.? What of various others creating special commissioners to ascertain and assess debts and damages due third parties from counties, towns, &c., and then directing the levy and assessment thereof upon the locality which should pay? If the legislature can authorize a municipality to make an improvement, appoint commissioners to ascertain and distribute its cost among those which in their judgment should bear it, and in such proportions as they think proper—why can it not, instead of delegating such power to others, act directly, and determine that a certain improvement shall be made, establish a board to direct and control its execution, apportion its cost as it thinks proper, and provide for its payment? Is there any greater exercise of power in one case than in the other? If the power to do an act can be legally conferred, the body which can make the grant can exercise the right itself.

In *People agt. Mayor of Brooklyn* (4 N. Y. 420), by virtue of the power conferred in the charter of the city, Flushing
(511) avenue had been improved, and the cost of the improvement assessed in part upon certain parties supposed to be especially benefited, it was held this was a proper exercise of the taxing power. Will it be argued that, if an act of the legislature had directly ordered the same improvement, had created a board to plan and execute the work, and had declared in the law itself what proportion of the cost the whole city should pay and what part specific corporations and individuals should bear, that such act would not be equally valid with the one it did pass?

In *Town of Guilford agt. The Supervisors of Chenango County* (13 N. Y. 143), it was held that a law of the state appointing commissioners to ascertain the amount due from the town to certain parties, and directing the assessment of the amount awarded by the board of supervisors of the county upon the town, was a valid and constitutional enactment. That case, which, like the one we are considering, provided for the assessment of a tax, the amount of which was to be ascertained by the means specified therein, was certainly unconstitutional if the act of 1872 is, for the reason we are discussing.

Whatever plausibility the objection may have from the words of the section and article of the constitution upon which the same is predicated, and whatever apparent contradiction there may be between it and the case we have cited, are explained by the remarks of Denio, Ch. J., in *Darlington agt. Mayor, &c., of New York* (31 N. Y. 164; *see pages* 182, 183), who in commenting upon the same article of the constitution to which the learned counsel of the mayor has referred, says: "The article of which the section is a part relates to the state finances, and, taken together, it constitutes the financial system of the state, so far as concerns constitutional restraints. The affairs of cities and counties, so far as they are regulated by the constitution, are treated of in other provisions." And precisely this explanation disposes of *People agt. Board of*
(512) *Supervisors of Kings County* (52 N. Y. 556), in its applicability to the case before us. The court had then before it a law imposing a state tax for state purposes, and that law was, of course, amenable to the article of the constitution regulating that species of legislation. Its soundness is not questioned, but it does not sustain the point urged now.

FOURTH. The objection that the creation of the board of engineers to superintend this work is a violation of article 10, section 2, of the constitution, in relation to the appointment of certain officers, cannot prevail. If the point be well taken, then *The Town of Guilford agt. The Board of Supervisors of Chenango County* (13 N. Y. 143), before cited, was wrongly

determined. In that case the court of appeals had before it the constitutionality of a law appointing commissioners to determine the amount of a tax to be levied. So, also, if the position be sound, *Litchfield agt. Vernon* (41 N. Y. 123) and *People agt. Lawrence* (41 N. Y. 137), were wrongly decided. In these cases the constitutionality of an act creating a special board of commissioners to do certain things relating to the closing of the Atlantic street tunnel in the city of Brooklyn, and to assess the cost thereof, was affirmed.

It would not be difficult to answer the objection were it an original question; but such a discussion is neither profitable nor necessary in view of adjudged cases, which this court has no power to reverse.

FIFTH. Neither is the law obnoxious to the first article of the constitution, section 9, which provides: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." No "public moneys," in the sense in which the word "public" is used in that part of the organic law, are appropriated so as to make a two-thirds vote of the legislature necessary. The use of the words "public" and "local" in the same section forbids the thought that they are synonymous expressions, and the
(513) structure of the whole sentence is in opposition to the construction which attaches to each a similar meaning. It was very easy to say, if that was the thought intended, that "no tax shall be imposed for a local or private purpose upon the state or a locality, except by the vote of two-thirds of the members elected to each branch of the legislature." Instead of that, the expression indicates, as well as the requirement, that the assent of two-thirds of the members was necessary when the money belonging to the whole state was to be appropriated for the benefit of a part. This construction makes the provision reasonable and proper, and demonstrates that the "public moneys" referred to in the section are those belonging to the state, and that the clause of the constitution cited is no limitation upon the power of the legislature to assess or tax the cost of a local improvement upon a locality. Neither by the law is any "private property * * * * taken for any public use," so as to make article 1, section 6, of the constitution applicable. Taxation upon a locality for an improvement therein is the exercise of a different power—the taxing power—whilst the constitutional provision just cited refers to the taking of property by the right of eminent domain. This distinction, ever since the able and exhaustive opinion of Ruggles, J., in *People agt. Mayor of Brooklyn* (4 N. Y., 419), wherein it is most clearly stated and explained, has been well recognized in this state, and repeatedly followed since.

SIXTH. The last objection urged is that "chapter 702 of the Laws of 1872 is also unconstitutional and void in so far as it imposes the payment of this money upon the city of New York for the benefit of the Harlem Railroad Company, as the compelling of such payment is beyond the scope and purview of the legislative power."

Assuming the truth of the statement contained in the point urged, that the tax is for "the benefit of the Harlem Railroad Company," the objection is still without force. There is no such limitation on the taxing power of the legislature. In *Town of Guilford agt. The Supervisors of Chenango*
(514) *County* (13 N. Y., 143) before cited in answer to an objection that the law imposing the tax was a mere gift to the parties in whose favor it was imposed, judge Denio said: "The legislature is not confined in its appropriation of the public money, or of the sums to be raised by taxation in favor of individuals to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude or charity." In *Litchfield agt. Vernon* (41 N. Y., 123), also before quoted, judge Grover (*page* 134), speaking of the previously cited case, says: "In that case it was held that the legislature had the power to impose a tax upon the inhabitants to pay a claim that had no legal validity, and that could in no way be enforced against the town. In other words, that it was in the power of the legislature to impose a tax upon a locality for any purpose deemed proper, and that its power, in this respect, is not restricted by the constitution of the state." The opinion of Mason, *J.*, in *People agt. Lawrence* (41 N. Y., 137, *see pages* 140, 141, 142), is to the same effect. The case of *People agt. Batcheller* (53 N. Y., 128) does not conflict with these views. It simply decides that a law requiring a town, without the consent of its inhabitants, to become a stockholder in a railroad company, is unconstitutional.

But the objection assumes a fact which is not true. The provisions are not for the benefit of the relator, exclusively. This we have heretofore endeavored to show in this opinion. The proper improvement and use of the avenue by both the city and the railroad, and to make the one consistent with the other, were the results to be obtained. What part of the work justly belonged to the city, and what to the relator, it was difficult to define with accuracy; and the work to be done by each was so interlaced, that it was deemed wise to direct its construction under a single plan. Perhaps, from parts of this work the railroad receives the larger benefit, and from others the city. The legislature in its wisdom has assessed the one-
(515) half part upon each. This power is nothing different from what is exercised in behalf of municipal corpora-

tions every day. A street is opened and graded through agricultural lands. In such a case the amount to be paid by the city or village, as a whole, is always considerable, and yet the objection was never made, or if made, has never prevailed, that it was unconstitutional to tax the entire municipality for work, a part of which, at least, benefited individuals only. Such owners are presumed to pay for that part which specially benefits them in the assessments, which they pay for such benefits over and above their share of the general tax, to which they also contribute. So in this case the legislature has determined that one-half the cost of the improvement, over and above its proportion of the tax levied upon the city, should be paid by the relator as its share of the peculiar benefits resulting therefrom. It is not for this court to say that this apportionment is unjust. To that body, as the supreme arbiter under our constitution, has the right to decide been committed, and with its decision this court has neither the power or inclination to interfere. Doubtless, in the exercise of these great powers they will often err, as any tribunal, which is but human, will; but no system of government has ever yet been devised, and none ever will be established, which shall, in any department, always do exact justice, and whose lawful powers, if stretched to their fullest extent, might not work injustice in particular cases. In the grant of power, much must be conceded to the discretion, good sense and integrity of the individual or body to whom it is granted; but the concession of that which is fairly given should never be witheld, because extreme cases can be supposed in which it might be exercised with danger to the public. Practically, it will generally be found that the danger is largely imaginative, and the injury claimed to be done scarcely perceptible.

Before closing this opinion, it may be well to advert to another view, applicable as much to each of the objections urged, as to the particular one in connection with which it has been hereinbefore stated.

(516) Statutes and constitutional rights existing in favor of a party, natural or artificial, may be waived. May not the act of 1872 be regarded as the embodiment of an agreement between the parties, to which all have assented—upon which all have acted—and the withdrawal of either from which cannot be permitted, because by its conduct it has induced the other to incur responsibilities which, it may fairly be assumed, would not have been incurred if the other had not assented? The relator accepted the law by making the contract for the work, which the act required it to make. The city, through its officers, accepted it, by no protest against its provisions; by allowing the chief engineer of its board of public works to become a member of the board of construction, which

directed the work and controlled the expenditure; by using its machinery for the collection of taxes, to assess, levy, collect and receive into the city treasury its one-half of the cost; by drawing warrants and paying over a million dollars thereon; and, through its citizens by the payment of the tax levied for the city's share of the cost. Thus, all parties have agreed,—the city through every officer and every tax-payer. No rule of law and no rule of honesty, should permit objections to prevail which have been so fully and explicitly waived.

As against the respondent, however, the strength of the point founded upon the acquiescence of the city in the law of 1872, has not yet been stated. Every tax-payer in the municipality has not only assented to the act, but actually executed it. As a law imposing a tax, if it may be so regarded, it has already spent its force by the assessment and collection thereof, and the obtainment of the money for this purpose only. Every tax-payer has actually paid his, her and its proportion of the amount which the city was to pay of the cost of this great improvement into the city treasury, and all, except that part which has been paid over in execution of the law, still remains therein pledged to this object. It cannot be used for any other purpose without a fraud upon the parties from whom it was collected, and who paid it that this work should
(517) not fail. When the mayor refuses to countersign this warrant as the law commands, he refuses, not in order to protect his constituency from money oppressively to be taken against their will, but to defeat their wishes, and to appropriate their means to some use other than that to which they have pledged and dedicated it. His action in so doing is not only contrary to the desire of the relator, but to that of the body of the people whom he professes to represent and whose voice he should obey. The citizens of New York have a right that their means shall be used for the very purpose to which they have applied them, and none of their officers should be allowed to refuse to execute the trust which tax-payers, under the law, have committed to their official hands, in the belief that the provisions of such trust would be faithfully executed.

The result of my examination is, that the peremptory mandamus asked for should issue.

Supreme Court—General Term.

FELICE TOCCI, Appellant, *against* THE MAYOR, ETC., OF THE CITY OF NEW York, the New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, Respondents.	73 Hun, 46. November Term, 1893.

VAN BRUNT, *P. J.*—This action is brought by a tax-
(47) payer to restrain the city officials from paying to the railroad companies, defendants, certain moneys under the provisions of chapter 339 of the Laws of 1892, upon the ground that it imposes upon the city a contribution to the private railroad structure belonging to the defendant railroad companies, and is, therefore, unconstitutional. Upon the application for an injunction *pendente lite* affidavits were submitted upon both sides, and certain material facts controverted in those affidavits. In cases of this description it is much better practice where the right to a preliminary injunction has been denied, and there are disputed questions of fact, that the party should go to trial and settle the facts, and there determine the question as to the right to an injunction, rather than to attempt to procure a decision of the General Term upon a state of facts which may be entirely changed upon the trial, and unless a very clear case is made by facts which could not be found to be different upon the trial such an order should be affirmed.

In the case at bar upon an examination of the papers upon which this application was founded, and the answers thereto, it seems to us that there is no possible reason for our interference with the court below. The whole fallacy of the plaintiff's action is the assumption that the contribution of money by the mayor, aldermen and commonalty of the city of New York to the enterprise in question is a contribution to a private use. On the contrary, it would appear that it is a payment upon the part of the city for benefits and privileges received; and with the question as to whether the city has paid a high or low rate for what it has acquired we have nothing to do.

It appears that the defendants, railroad companies, were,
(48) prior to 1872, the owners of and operating on Fourth Avenue in the City of New York, steam railroads from Forty-fifth Street up to and across the Harlem river. In 1872 an act was passed giving the New York and Harlem Railroad Company a statutory grade between Forty-fifth Street and the Harlem river, an increased width of depressed roadway, and where the said roadway was to be in tunnel giving to the city and the people the full width of Fourth Avenue between Fifty-sixth and Ninety-sixth streets. Between Ninety-sixth street and

Harlem river, the railroad structure was to be upon a viaduct and in a cut inclosed by sidewalls with undercrossings between One Hundred and Second and One Hundred and Thirteenth streets inclusive, and over crossings from One Hundred and Nineteenth street to One Hundred and Twenty-ninth street inclusive. The said railroads crossed and were to cross the Harlem river slightly above highwater mark. By this act the railroad companies were given the exclusive use and occupation of said road, and persons were prohibited from entering or passing upon the same, or any portion thereof under a penalty. In 1890 an act of Congress was passed providing that the Secretary of War should cause the low bridges then crossing the Harlem river to be replaced by other bridges at the expense of the owners thereof *as soon as the necessary legislation*, if such legislation were necessary, should enable the change in grade to the approaches of said bridges to be made, the owners of said bridges to be allowed a reasonable time in which to complete the work necessary for such bridges, and said bridges to have a clear space between the under side thereof and the high water of spring tides of twenty-four feet.

To enable the railroad companies to comply with the act of Congress all that would have been necessary to be done, was to change the grade from One Hundred and Twenty-fifth street to the Harlem river, which would have been much less expensive to the companies than the plan hereinafter mentioned, provided for by the act of 1892. But had this method been adopted, no part of Park Avenue would have been returned to public use, and it would not have permitted the free and unobstructed passage of the intersecting streets from one side of the city to the other.

In 1892, in order to enable the said railroad companies to comply with the requirements of the act of Congress,
(49) the Legislature passed an act changing the grade of the road from One Hundred and Sixth street to and over the Harlem river to One Hundred and Forty-ninth street, making in the act various requirements in respect to the plans, specifications and estimates for said work, and to the method in which the work should be done. The act further provided that when the plans, specifications and estimates should be made and filed as therein required, the expense and cost of the improvement should be borne and paid by the defendant, the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progressed. The act further provided that when and as often as it should appear by the certificate of the superintending engineer of the work of said improvement, duly

certified by a board provided to be appointed by said act, that the sum of $25,000 had been expended thereon by either of said railroad companies, specifying the portions and divisions of said improvement where the said expenditure had been made, the comptroller of the city of New York should draw his warrant, etc., for one-half of the same. The act further provided that in no event should the proportion of the cost of said improvement to be paid by the city of New York exceed the sum of $750,000, and that if the cost of said improvement should exceed the sum of $1,500,000, then the entire cost over and above such sum should be borne and paid for by said railroad companies. And, further, that said improvement structure and bridge should be exclusively for the uses and purposes of the railroad companies, and it should not be lawful for any person or persons other than a public officer in the execution of his duty as such, with his agents and assistants, to enter and pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for such purpose, with the consent of such corporation, under the penalty of a fine, this provision being the same as that contained in the act of 1872.

It is urged upon the part of the appellant that the contribution imposed upon the city by the statute of one-half the cost of the structure from One Hundred and Sixth street to
(50) the river, declared to be exclusively for the uses and purposes of a private railroad company, is illegal and in violation of the Constitution. And our attention is called to the provision of the Constitution which, so far as it is applicable to the question now before the court is as follows:

"No * * * city * * * shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, or corporation, * * * nor shall any such * * * city * * * be allowed to incur any indebtedness except for * * * city * * * purposes."

The argument of the counsel for the appellant is that the statute under consideration provides that the city shall contribute practically to two material works: *First*, the construction of a railroad structure, which is expressly stated to be exclusively for the use of the defendant company, that is, the New York and Harlem or the New York Central and Hudson River Railroad Company, and, *secondly*, the filling in, regulating and paving under that structure of some space and street crossings from One Hundred and Fifteenth street to One Hundred and Thirty-third street, and making the same part of the public avenue; and that if the second purpose is not within the prohibition of the Constitution, yet if it has been so inextricably mixed in the statute with the first purpose,

which is within such prohibition, that it is inseparable, and the entire provision is vitiated. It is further urged that in the case at bar, however, the purposes and objects are not so mixed as to defy judicial discrimination, either in principle or in fact, and, therefore, the unlawful can and must be set aside; for the provision, so far as it prescribes the contribution to the ostensible public work of filling in, regulating, etc., can be readily separated from the part imposing upon the city the payment of one-half the cost of the private railroad structure declared to be for the railroad's exclusive use and purpose.

We think, however, that in this statement of propositions the essential features of the improvement are lost sight of by the appellant. It is undoubtedly true that the expense attendant upon the opening, filling in, regulating and paving of Park avenue, released by the elevation of the defendant's railroad tracks, can be separated from the expense of building such elevated tracks. But this is by no means the whole of the improvement, nor is it the part of the improvement in
(51) which the city is most largely interested. These railroad companies were in exclusive occupation of a part of the public streets of the city of New York. It was deemed by the Legislature advantageous to the city of New York that such occupation should cease, and that these portions of the streets should be restored to public use, and that the interruption of communication between the two sides of the city should terminate; and they considered that the advantages to be derived from these changes and the others to be made by the railroad companies, which the Legislature had no power whatever to enforce upon said companies, were of sufficient importance to the city of New York to justify its payment of one-half of the expense of the improvement up to $750,000. It is entirely immaterial in the consideration of this question whether the railroad company owned the fee of the land which they occupied or not. For all practical purposes they were its absolute owners, and entitled to its absolute control and exclusive use for the purposes of their railroads. It was for the abandonment of these rights, and the expense of other constructions in their stead, that the city was authorized to make the payments provided for by the act.

The provision of the act, in regard to the payments to be made, that the certificate of the superintending engineer of the work of the improvement should specify the portions and divisions of said improvement where said expenditures had been made, was simply a method of determining as to how much money, under the provisions of the act, the city at any one time could be called upon to pay towards the improvement.

It was a matter of considerable moment to the city of New York as to whether unobstructed communication should be had

between the different sides of the city from One Hundred and Fifteenth Street to the Harlem River. The improvement was but one work. There were different things to be done in carrying out its design. But merely because a portion of the improvement required either the removal or the bringing upon the ground of earthy material, and another portion required the bringing upon the ground and the erection of iron structures, by no means segregated the parts of the improvement. They were, each and every of them, necessary parts of one design. The elevation of tracks and the improving of the street were parts of the same work; and it is to this
(52) one work that the city contributes. Even though the claim that the city contributes to the private structure of the railroad were true, if in consideration of such contribution the railroad surrenders rights which it had to public streets and avenues, and the Legislature chose to permit the city to buy out such rights by contributing to the expenses incurred because of such surrender, we see no possible constitutional objection thereto. It is merely paying a consideration for substantial advantages supposed to be gained. And we have nothing to do with the question whether the Legislature directed the city to pay a high or low price for the privileges which it acquired, or made an improvident bargain thereof, if their value is of such a character that an absolute gift cannot be inferred.

Now, it is conceded by the argument upon the part of the appellant that the acquisition of the streets occupied by the railroad companies and the establishment of uninterrupted communication between the two sides of the city are matters of great value, but, it is contended, not of the value which the Legislature directed the city to pay. Into this inquiry we cannot enter.

It is further urged upon the part of the appellant that, while the act is substantially granting a new franchise and use to these railroads, it contains no provision for a conveyance by the roads to the city or even a quit-claim deed or release of anything they then owned. But this in no manner affects the question. It is undoubtedly true, as was so ably shown by the counsel for the appellant, that the use of the streets by the railroad company, being abandoned because of their right acquired for an elevated railroad, the land in the street formerly occupied by them naturally and legally reverted to the city for street purposes. The conditions remained the same whether there was a formal release or a release by operation of law. The railroad companies surrendered their rights and accepted a new franchise, and the Legislature authorized the city to pay them not to exceed a certain sum for so doing. As

already stated, we see no constitutional objection to such a provision under the circumstances disclosed in the case at bar.

The order should be affirmed, with costs.

Follett and Parker, *JJ.*, concurred.

Order affirmed, with costs.

COURT OF APPEALS.

EMILY TALBOT, Appellant,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondents.
151 N. Y., 155.

Argued October, 1896; decided December, 1896.

BARTLETT, *J.*

This action is brought to enjoin the defendant corporations from maintaining or using the bridge over Fourth avenue on which Forty-eighth street crosses as a public highway and a certain protection wall adjacent to plaintiff's house in the same street; also to compel the removal of the bridge and wall.

(158)

In 1869 the plaintiff purchased a lot 250 feet west from Fourth avenue, on the north side of Forty-eighth street, and erected thereon a brown stone front house. Shortly after the erection of this house the New York and Harlem Railroad Company acquired title to all the land on the north side of Forty-eighth street, lying between plaintiff's premises and Fourth avenue; also a large amount of land on the south side of the street opposite the lot of plaintiff. On the 1st of April, 1873, the New York and Harlem Railroad Company leased to the New York Central and Hudson River Railroad Company its railroad, extending from Forty-second street along Fourth avenue to the Harlem River.

In 1872 the Legislature passed an act (Ch. 702) entitled "An act to improve and regulate the use of the Fourth avenue in the city of New York," for the purpose among others of rendering the same safe and convenient for persons crossing the same.

The act provided that the New York and Harlem Railroad Company should construct, at Forty-eighth street, a tunnel under the Fourth avenue for sidewalks and carriage ways, or a bridge over the same for a like purpose, and that the tunnel or bridge should be at least thirty-four feet wide. The act had for its general object the abolition of grade crossings to conserve the public safety, as it was contemplated to run trains from the Grand Central Station at Forty-second street to the Harlem River at a high rate of speed. It was a work

of public necessity, and involved a large expenditure, which was shared equally by the city of New York and the defendants.

The act appointed a board of engineersto execute, direct and superintend the construction of the improvements,
(159) to be called "The Board of Engineers of the Fourth Avenue Improvement."

This board was made up of five members, one of whom was the chief engineer of the board of public works of the city of New York for the time being, and another was the engineer of the New York and Harlem Railroad Company, and was authorized and directed to take entire charge and control of the work, and to prepare plans and specifications and an estimate of the expense, and file them in the office of the comptroller of the city of New York; they were also required to take an oath of office before a judge of a court of record and file it with the comptroller.

All these provisions were duly observed, and on the 30th of June, 1872, it was resolved by the board to authorize the construction of an iron bridge over the railroad tracks at Forty-eighth street. On the 25th of July, 1872, the board awarded a contract for this work to the Watson Manufacturing Company, in accordance with plans, etc., duly filed, and directed the New York and Harlem Railroad Company to execute the contract with that company. This was done, the bridge was constructed, and is the one complained of by the plaintiff. The bridge has approaches on its westerly side commencing opposite to the eastern boundary of plaintiff's premises and ascending upon the lines prepared by the board of engineers until they meet the iron structure spanning the avenue.

The bridge is thirty-four feet wide as the act requires, and is placed on the south side of the street, the latter being about sixty feet in width, thus leaving the north sidewalk and a strip of the surface roadway unoccupied by the new structure. In order to close this side of the street and prevent those traveling upon Forty-eighth street from injury in attempting to cross the railroad tracks at grade, and as a part of the official plan as filed, a wall of brick was constructed eight feet three inches high and about thirty-one feet long, beginning
(160) at the southeasterly corner of plaintiff's house, and extending over the discontinued portions of the sidewalk and roadway to the corner of the bridge structure.

The trial court found that the bridge had been used since its construction as a public highway both for carriages and foot passengers, and that its approaches have been kept paved and in order and the bridge lighted ever since by the corporation of New York. It is further found that the corporation defendants have not had the custody of, or maintained the

bridge or the wall, or used the bridge; that they have in several instances replaced bolts to prevent danger to passing trains, and repainted the iron work which had been disfigured by the smoke of the engines.

It is also found that the board of engineers were able and skillful men, and that the work was examined by them after completion and accepted as duly performed under the provisions of the act of 1872.

It was under this condition of affairs, and nearly twenty years after this work was begun, that the plaintiff instituted this suit, alleging she had suffered great damage by reason of the bridge and wall.

The trial court found that the effect of the wall was to prevent, to a certain extent, access of a carriage to the front steps of plaintiff's house, and that in the early morning it cast a slight shadow into the front basement room, but later in the day the reflection from the wall increased the light.

It was also found that the bridge itself did not injuriously affect the light, air or access to plaintiff's house; that the damage caused by the wall was inconsiderable, and that it could not be determined from the evidence given how much in money that damage had been, or how much resulted from the lawful occupation of its own land by the railroad company adjoining and opposite to the plaintiff's premises, and not forming a part of Forty-eighth street.

It is not necessary, however, to determine whether the court below properly disposed of the question of damages upon the evidence, as we are of opinion that the law, as applied
(161) to the admitted facts, imposes no liability on the defendants.

We have in this case a change of grade of one of the public streets of the city of New York, the fee of which was in the city, by command of the legislature, under the supervision of a board of engineers of its own creation.

The defendant company acted as the agent of the board, and conducted the work according to its plans and under its supervision and control. On the completion of the work and its acceptance by the board it has been maintained and used by the city of New York ever since as a part of its highway system.

These facts show that even if the plaintiff has suffered damage, and can compel removal of the wall and bridge, the defendants are not liable in damages, nor would a decree of removal against them be of any force or effect, as they are not in possession of the bridge, or maintaining or using the same.

We think, however, that the facts show no liability on the part of any one.

While it is a general rule that abutting owners upon city

streets, although not vested with the fee, are entitled to the use of the street for access and other purposes, of which they cannot be deprived without compensation, yet this right is subject to important exceptions. In the case of *Reining* v. *N. Y., L. & W. R. Co.* (128 N. Y., at page 165), Chief Judge ANDREWS, in a discussion of these exceptions as applied to a very different state of facts, said:

"The cases of change of grade furnish apposite illustrations. They proceed on the ground that individual interests in streets are subordinate to public interests, and that a lot owner, although he may have built upon and improved his property with a view to the existing and established grade of the street, and relying upon its continuance, has no legal redress for any injury to his property, however serious, caused by a change of grade, provided only that the change was made under lawful authority. This, it is held, is not a taking of the abutting owners' property, and the injury requires no compensation."

In the case at bar there is no closing of the street, nor
(162) is the plaintiff excluded therefrom within the principle of the *Story* case (90 N. Y. 122).

The abolition of the grade crossing was required for the public safety, and the wall shutting out the traveler from the north sidewalk and strip of roadway leading down to the railroad tracks was a necessary part of the work ordered by the legislature.

This wall stands upon the property of the defendants and the city.

The proposition that in this case there is no taking of private property for public use under the provisions of the Constitution and that the acts complained of are *damnum absque injuria*, has been frequently sustained by this court. (*Radcliffe's Executors* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Bellinger* v. *N. Y. C. R.R. Co.*, 23 N. Y. 42; *Moyor* v. *N. Y. C. & H. R. R.R. Co.*, 88 N. Y. 351; *Uline* v. *N. Y. C. & H. R. R.R. Co.*, 101 N. Y. 98; *Atwater* v. *Trustees, etc.*, 124 N. Y. 602.)

The Supreme Court of the United States has also approved the rule. (*Smith* v. *Corporation of Washington*, 20 How. [U. S.] 135; *Transportation Company* v. *Chicago*, 99 U. S. 635, 641.)

The appellant discusses other questions which need not be considered in detail, as they have no direct bearing upon the main and controlling point in this case. The plaintiff's contention that the defendants unlawfully occupy that portion of Forty-eighth street which is barred off from public use by the bridge and wall is not relevant to this controversy; it is a question between the defendants and the city of New York if the latter's property rights have been invaded.

The bridge approach and wall were located by the state through its agents; and as to the strip of land shut off from public use, it was in no legal sense a closing of the street, but a necessary provision to turn the tide of travel upon the sidewalks and roadway over the bridge. There is no finding, as contended, that this wall during the last ten years, or
(163) for any other period of time, has been maintained by either of the defendants, but there is an express finding to the contrary.

It is not necessary to examine the question of the Statute of Limitations.

We agree with the learned court below that the plaintiff established no cause of action, and that the complaint was properly dismissed on the merits.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

Court of Appeals.

HANNAH CONABEER, Appellant,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and The New York and Harlem Railroad Company, Respondents.
} 156 N. Y., 474.

Argued June, 1898; decided October, 1898.

Appeal from a judgment of the late General Term of
(476) the Supreme Court in the first judicial department, entered January 26, 1895, affirming a judgment in favor of defendants entered upon a decision of the court dismissing the complaint on the merits on trial at Special Term.

This action was commenced on the twentieth of November, 1891, to obtain an injunction perpetually restraining the further operation of the defendants' railroad in Park avenue, formerly known as Fourth avenue, in the city of New York, opposite the premises of the plaintiff, and for damages to the rental value thereof.

In 1807, by chapter 115 of the laws of that year, three commissioners were appointed who were empowered to lay out streets and avenues upon the northern portion of Manhattan Island, which included the locality in question. On April first, 1811, they filed a map showing the streets and avenues as they now generally exist. Upon this map One Hundred and Fourth street was shown to be of the width of sixty feet, and Fourth avenue of the width of one hundred feet. That act also provided that the map, plans and surveys so made and filed should be final and conclusive as to the mayor, aldermen

and commonalty of the city of New York, the owners and occupants of lands within the boundaries of the streets, and in respect to all other persons whomsoever. For many years after the filing of this map these streets remained unopened and had no existence, except that which resulted from their being designated as such on the map.

In 1831, by a special act of the legislature (Ch. 263),
(477) the New York and Harlem Railroad Company was incorporated, with power to construct a railroad from any point on the north bounds of Twenty-third street to the Harlem river, between the east bounds of Third avenue and the west bounds of Eighth avenue, with the right to operate it by steam, or by any mechanical or other power that the company might choose to employ. By that act it was given the right to locate its railroad and to file a map thereof in the office of the register of New York, but it was not to be filed until it should have been submitted to, and approved by, the common council. It was then authorized to build its road, to take all lands and real estate necessary for its construction, and to receive or take all voluntary grants or donations of land to aid in the accomplishment of that work. The act likewise provided that lands thus taken, which were not donated, should, if the parties could agree, be purchased of the owners at a price agreed upon between them, and then provided for condemnation when an agreement could not be had. It declared that the corporation was authorized to construct such a railroad, to use single or double tracks, and that in case its railroad was located along any public street or avenue then laid out upon the map or plan of the city of New York, it should leave sufficient space in the street on each side of the railroad for a public highway for carriages and a sidewalk for foot passengers. It also provided that the corporation should not be deemed to be authorized to construct a railway across or along any of the streets thus designated, whether open or not, without the consent of the mayor and aldermen, who were authorized to grant permission to the corporation to construct its railroad across or along the streets or avenues of the city.

The provisions of this act were complied with by the New York and Harlem Railroad Company, and it located its route along the center line of Fourth avenue, from Twenty-third street to the Harlem river, and filed a map in the register's office, October 22, 1831, together with a resolution of the common council, approved by the mayor, authorizing the company to construct its road over Fourth avenue. It obtained
(478) the consent of the municipal authorities to the location of such road by an ordinance approved by the mayor December 22, 1831.

At that time the locality which included the premises in

question consisted of farm lands and salt meadows, known as a part of the "Harlem Flats," a portion of which was owned by one Margaret McGown. On the eighteenth of January, 1832, Mrs. McGown conveyed to the New York and Harlem Railroad Company and its successors a portion of the land owned by her, consisting of twenty-four feet of land running through the center of Fourth avenue between Ninety-seventh and One Hundredth and Sixth streets for and during the period it might remain an incorporated company, on which to construct its railroad, but for no other purpose, with the right to slope its embankments or excavations so much farther beyond the line of the premises granted as might be necessary to support its work, not, however, to extend beyond the width of the avenue, which was one hundred feet.

Some time anterior to 1835, the railroad company constructed along this portion of Fourth avenue a stone viaduct upon the land in question, upon which two tracks were laid. The only difference between the old viaduct and the one now complained of is that the width of the latter was increased sixteen feet on each side, and accommodated two additional tracks.

In 1835, the matter of widening Fourth avenue from one hundred to one hundred and forty feet was brought before the common council by a petition requesting that the avenue be thus widened. One, if not the chief, ground upon which this was asked was the existence of the railroad in the center of that avenue. Subsequently, and in 1837, the street was widened to one hundred and forty feet.

Fourth avenue was not opened until nearly twenty years after the construction of the defendants' road over this part of it. In the proceedings for opening that street, the city of New York assumed to acquire the title to the strip of land upon which the defendants' road was constructed, and for which a nominal award of one dollar was made for each
(479) of the lots across which it passed. No attempt was made by the city to acquire the easements secured by the railroad company under its deed from Mrs. McGown, either as to its right to build and maintain its road along the strip purchased of her, or to slope its embankments and excavations so far as necessary to support the work. The possession by the railroad company of the portion of the street thus occupied was not attempted to be disturbed by the city. When the street was opened in December, 1853, the railroad was upon a high viaduct along the center of the avenue, which was in the exclusive possession of the New York and Harlem Railroad Company. The portion so occupied has never been used as any part of the public street.

In 1872, by chapter 702 of the laws of that year, the legisla-

ture passed an act to improve and regulate the use of Fourth avenue in the city of New York. That act authorized and required the railroad company to regulate the grade of its railroad in Fourth avenue in a manner specified, and to construct such viaducts, bridges, excavations, tunnels and openings as were therein described. It provided that from Fifty-sixth to Ninety-sixth street the railroad should run through a covered way with openings therein, and thence continue upon the grade as it then existed to the center of One Hundred and Fifth street. It also authorized the railroad company, for the purpose fo facilitating rapid transit and accommodating local traffic, to lay two additional tracks on such avenue, and to make such landings and excavations therein as might be required for the tracks and the entrance and delivery of its passengers outside of the excavations and viaduct. It created a board of engineers to execute, direct and superintend the construction of such improvement, the expense thereof to be borne by the city and the railroad company in equal proportions. It forbade the municipal authorities of the city from obstructing the use of Fourth avenue for that purpose above Forty-second street, authorized the municipal corporation to pass such ordinances as might be requisite or necessary to facilitate the improvement, provided that the railway be exclusively for
(480) the uses and purposes of the railroad company, and that the legislature might at any time alter, amend or repeal that act.

This improvement was carried on and completed under the direction of a board of engineers appointed by the legislature for that purpose. The height of the old viaduct at One Hundred and Fourth street, opposite the premises now owned by the plaintiff, was unchanged. The improvement at that point consisted in taking down the old viaduct and erecting a new one of the same height, but fifty-six feet wide. It was completed in 1873, in which year the New York and Harlem Railroad Company leased to the New York Central and Hudson River Railroad Company its railway for four hundred and one years. Since that time the railroad as then constructed has been in the possession of and operated by the latter company as such lessee.

In 1887, fourteen years after the improvement directed by the statute of 1872 was completed, the plaintiff purchased her lot at the corner of Fourth avenue and One Hundred and Fourth street. It was a part of the premises owned by Mrs. McGown in 1832 when she deeded the land in Fourth avenue to the Harlem Railroad Company. Upon the plaintiff's lot there was at the time of her purchase, and still is, a three-story and basement brick and stone building used as a dwelling house. Since June, 1887, she has been the owner in

fee and in possession and occupancy of the premises thus purchased.

Since the lease to the New York Central and Hudson River Railroad Company it has maintained and operated the railroad upon such viaduct and runs thereon a large number of trains during the day and night drawn by locomotives, and in its operation steam, smoke, noxious and unpleasant gases, vapors, coal, soot, cinders, ashes and sparks have been and are frequently emitted from such locomotives which fall upon the plaintiff's premises; loud and disagreeable noises have been and are produced by its operation; the free, steady and natural passage of light is interrupted, and dark shadows and
(481) bright flashes of light are produced. The viaduct and railway structure are of a lasting and permanent nature, intended for continuous and permanent use, and the defendants intend to continue to maintain, use and operate a railroad thereon.

The viaduct is about forty feet from the building line upon Fourth avenue. Of this, twenty-five feet in width on each side are used as a roadway for teams, carriages and other vehicles, and fifteen feet as a sidewalk. The street-line is now forty-two feet from such viaduct, while before the widening of Fourth avenue the street line was only thirty-eight feet from the viaduct as first constructed.

Joseph Ullman for appellant.

Ira A. Place, Alexander S. Lyman and *Hamilton Harris* for respondents.

(482) MARTIN, *J.* It is obvious that when the deed by Mrs. McGown to the New York and Harlem Railroad Company was given, it was understood between the parties that its railroad was to be built upon an embankment or viaduct in Fourth avenue, as it expressly provided not only that the grantee should have twenty-four feet of land in the center of the avenue during its corporate existence upon which to construct its railroad, but it also conferred upon the company the right to slope its embankment to the full
(483) width of the street. It is equally apparent that the grantor intended to confer upon the railroad company the right to construct, maintain and operate a steam railroad upon the premises so conveyed, and to thereby release it from any damages to her adjoining property arising from the proper exercise of that right. Thus the property now owned by the plaintiff which adjoins Fourth avenue became burdened with the easements or right of the company to maintain and operate its railroad at that place, so that neither the owner, nor her grantee, could recover damages for any injury to the property arising from the contemplated use, and could in no

way interfere with the proper exercise of that right by the railroad company during its continuance.

The only injury or interference with the premises now owned by the plaintiff was found by the trial court to have been caused by acts and conditions which were necessarily and naturally incident to the operation of a steam railroad. The court expressly declined to find that those acts and conditions deprived the plaintiff of her property in the avenue, or of the easements appurtenant thereto, or to find that access to the premises, or the approach of light and air thereto, was obstructed otherwise than by acts and conditions which were incident to the operation of the defendants' railroad. It also declined to find that the construction and operation of the defendants' railroad had diminished the value of the plaintiff's premises.

An examination of the evidence contained in the record shows quite plainly that the trial court was justified in declining to find that the plaintiff's access, light and air were obstructed, except in the manner stated. Therefore, the question presented is whether, under the proof contained in the record, the plaintiff was entitled to restrain the defendants from operating their road upon the viaduct in front of her premises, upon the ground that it affected them in the manner in which the operation of a steam railroad thus located naturally and necessarily would.

It is to be remembered that Mrs. McGown was the common source of title to both the plaintiff's and the de-
(484) fendants' lands, and that prior to her transfer of the premises now owned by the plaintiff she had transferred to the Harlem Railroad Company the right to build, maintain and operate its road in the center of the avenue where it is now located, thereby imposing upon the remainder of her land the burden of the presence of a railroad at that place to be maintained and operated as such. When she granted that right, it was the understanding of the parties that the premises granted were to be thus used, and was upon her part an irrevocable grant to the New York and Harlem Railroad Company and its successors of the right to so use the avenue during the period of the incorporation of that company. It in effect released to it any consequential damages to her remaining property which might be occasioned by the annoyances or injuries resulting from the operation of the road.

When that right was granted, Fourth avenue was but one hundred feet in width, and the viaduct or embankment first constructed by the defendants was at most but thirty-eight feet from the exterior street line. Since that time the street

has been widened to one hundred and forty feet, so that the street line is now forty-two feet from the defendants' viaduct.

It is claimed by the plaintiff that, as the New York and Harlem Railroad Company used only twenty-six feet of the avenue for the construction of its first viaduct, it waived any right it possessed in the remainder of the street, and, consequently, was entitled to maintain its viaduct upon that portion of the street only. Where a right is obtained by prescription, the measure of the right is controlled by the extent of the use. But where, as in this case, there is an express grant, the fact that the grant to its fullest extent is not immediately used will not amount to an abandonment or waiver of the rights thus expressly granted. Where one acquires a title by deed, it will not be affected by non-user unless there is a loss of title in some of the ways recognized by law. Mere non-user, however long continued, does not create an abandonment. (*Welsh* v. *Taylor*, 134 N. Y. 450; *Haight* vs. (485) *Littlefield*, 147 N. Y. 338.) Therefore, as between the plaintiff's grantor and the defendants, it is quite evident that the latter may exercise all the rights conferred upon them by the deed of Mrs. McGown, unless there has been a loss of that right in some of the ways recognized by law. There is no proof of any such loss. That the plaintiff's remote grantor, Mrs. McGown, surrendered the easements in Fourth avenue appurtenant to her abutting property, so far as the same were affected by the erection and operation of this railroad, there is no doubt, and the plaintiff could acquire no greater rights than were possessed by her. This court has several times held that a release or abandonment of the easements of light, air and access which are appurtenant to property abutting upon a public street may be established by any evidence which clearly indicates an intention upon the part of an abutting owner to abandon the right, at least where it has been acted upon by the other party. That the deed from Mrs. McGown to the defendant effected such a release and abandonment is obvious. (*White* vs. *M. R. Co.*, 139 N. Y. 19; *Foote* v. *M. E. R. Co.*, 147 N. Y. 367; *Ward* vs. *M. E. R. Co.*, 152 N. Y. 39.)

Although, under the statute of 1807, the commissioners appointed made a map which included Fourth avenue, still, until the street was opened and the damages to the owners of the land paid, the title remained in the latter. By the Laws of 1831 the Harlem Railroad Company was vested with power to purchase and hold such real estate as was necessary for the purposes of its incorporation, and was authorized to build its road in the public streets or avenues laid out on the map of the city. That act also provided that sufficient space on each side of the railroad should be left for a public highway for carriages and for a sidewalk for foot travelers. These rights

were reserved and granted, subject to the approval of the mayor, aldermen and commonalty of the city, which was obtained. In 1832, in pursuance of the power thus conferred,
(486) the New York and Harlem Railroad Company purchased the right of way of Mrs. McGown, to which we have referred, and the road was constructed thereon. In 1835, with the consent of the legislature, the municipality widened this street and opened on each side of the defendants' railroad streets for teams and foot travelers as required by the statute to which we have adverted. When this street was opened, the municipality assumed to acquire the title of the New York and Harlem Railroad Company to the property which it owned in Fourth avenue, awarding it therefor the nominal sum of one dollar upon each lot. At that time, however, the municipal authorities and the legislature recognized the right of the railroad company to continue its road in the street and in no way disturbed its possession or the exercise of that right. It is claimed that by this proceeding the city became vested with the title to the property of the railroad company, and, hence, that the deed from Mrs. McGown to the New York and Harlem Railroad Company was abrogated and its effect wholly annulled. This contention cannot be maintained. If it be admitted that the naked title to the land passed to the city, it is still clear that the consent of Mrs. McGown to the construction and operation of this road did not pass with it. That grant was at least an irrevocable consent to the use of the land for a specific purpose, which continued and remained in the corporation to which it was made. But if, as claimed, it passed to the city, so that the city had the right formerly possessed by the railroad company, then it is equally clear that the right still exists, and as the city has consented to the use of the street, Mrs. McGown and her subsequent grantee are yet bound by that grant. When the street was opened in 1853, the railroad was upon a high viaduct along the center of the avenue which was in the sole and exclusive possession of the railroad, and no portion of it was occupied as a public street. Therefore, whatever rights the city may have acquired, it is quite evident that, so far as Mrs. McGown was concerned, the right which she had granted to the railroad company never revested in her, and, consequently, neither she nor her grantees can assert the right thus released.

In 1872 the legislature passed an act adopting a plan
(487) for the improvement of Fourth avenue. By that act the railroad corporation was authorized and required to regulate the grade of its road, and authorized to lay two additional tracks for the accommodation of traffic and to facilitate rapid transit in the city. By the same act the officers

of the municipality were forbidden to obstruct the improvement or the use of Fourth avenue for that purpose. Therefore, not only the municipality consented to the improvement made in pursuance of that statute, but the legislature expressly authorized the use of the avenue for that purpose and to the width of the present structure, so that, unless the plaintiff has some right in the street which is superior to that of the defendants and to the combined power of the legislature and municipalty, this action cannot be maintained.

It is manifest that the only injury the plaintiff has sustained resulted from the proper use and operation of the defendants' steam railway; and as the plaintiff's grantor expressly conveyed to the defendants the right to maintain and operate it there, the plaintiff cannot recover for any injuries arising from that cause. The defendants' use of the street for the purpose of building, maintaining and opening its railroad was a legal one. It was constructed and is maintained and operated under and by virtue of the grant by Mrs. McGown and the combined authority of the legislature and municipality. "The Legislature, by virtue of its general control over public streets and highways, has power to authorize structures in the streets which, without such authority and under the common law, would be held to be encroachments or obstructions, and this power it may delegate to the governing body of a municipal corporation." (*Wormser* v. *Brown*, 149 N. Y. 163, 171.) As the appropriation of this street by the defendant for the purpose of constructing and maintaining its road was legal, no merely consequential damage to the owner of an adjoining lot, having no title to the street, furnishes a ground of action against the defendant. (*Fobes* v. *R., W. & O. R. R. Co.*, 121 N. Y. 505,
518.) Where a railroad is built in a public street or
(488) highway with proper care and skill, after the public rights and private property, if any, in the highway or soil have been acquired, the railroad is not responsible for any damages to private property necessarily resulting from its construction and operation. (*Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98; *Conklin* v. *N. Y., O. & W. R. R. Co.*, 102 N. Y. 112.)

The cases of *Reining* v. *N. Y., L. & W. R. R. Co.* (128 N. Y. 157) and *Egerer* v. *N. Y. C. & H. R. R. R. Co.* (130 N. Y. 108) in no way impair the doctrine of the *Uline* and *Conklin* cases. Nor are they applicable to the facts in this case. In those cases it was held that the authorities of a city have no right to substantially close a street for ordinary street uses against an abutting owner, and that before an established street can be closed against such owner he would be entitled to compensation. In the case at bar the street at the place where the defendants' railroad was constructed was never opened or used

as a public street of the city. The streets in Fourth avenue were, by the command of the statute, laid out upon either side of the railroad structure, and were the only streets ever actually opened in that avenue. So that the plaintiff never acquired or possessed any right to the use of Fourth avenue as a public street, except such as she now enjoys.

This case is clearly distinguishable from the elevated railroad cases upon which the plaintiff relies. In those cases there was no grant by the abutting owners of the right to use the street for the purposes for which it was used, and the appropriation of the street was held to be illegal, while here the use of the street was legalized by a grant from the plaintiff's grantor, as well as by the legislature and municipal authorities. We are of the opinion that the grant to the New York and Harlem Railroad Company by the plaintiff's grantor is a substantial bar to the plaintiff's claim in this action. It is no answer to this position that the city subsequently, for a nominal consideration, obtained by condemnation the naked fee to the twenty-four feet of land deeded by Mrs. McGown to the New York and Harlem Railroad Company. In whomsoever the
(489) mere naked title to the twenty-four feet may rest, it is obvious, from the record, that the right to maintain and operate the defendants' road, with the consent of the plaintiffs' grantor, was not intended to be affected, but to remain in the defendants as a protection to their right, so long as the road was operated in that avenue and the time mentioned in the grant had not expired.

Under these circumstances, we agree with the learned trial court that neither Mrs. McGown nor her grantees, immediate or remote, can properly ask a court of equity to enjoin the operation of the defendants' railroad, to which her assent was thus expressly given. In *American Bank Note Co.* v. *N. Y. E. R. R. Co.* (129 N. Y. 252) this court held that where a public use authorized by law takes no land of an individual, but merely affects him by his proximity, the necessary annoyances of that use furnish no basis for damage. It was there expressly decided that noise was not an injury for which damage might be recovered, and that in that class of cases the abutter could recover only the damages to his easements of light, air and access. In *Wormser* v. *Brown* (149 N. Y. 163) this court determined that an interference with the view from the plaintiffs' windows would not entitle them to relief by injunction, and that the granting or refusal of equitable relief by way of injunction depends to a great extent upon the particular facts in each case, and is largely discretionary with the court in which the action originated. *In People ex rel. N. Y. & H. R. R.* v. *Commissioners of Taxes* (101 N. Y. 322) the judgment of this court was to the effect that the tunnels, tracks, superstruc-

ture, substructures, stations, viaducts and masonry of the defendants situated upon this avenue were land, within the meaning of the statute in reference to property liable to taxation, and that the fact that the city was required to pay a portion of the expense of the construction of the viaduct in question did not divest it of the incidents of other property belonging to the railroad company, or give the city any title to it, especially in *view of the fact* that the city was forbidden to obstruct the improvement or the use of Fourth avenue above Forty-second street for that purpose. Under the circumstances of this
(490) case, it is manifest that the abutting owners who derived their title from Mrs. McGown subsequent to her grant to the New York and Harlem Railroad Company were not entitled to have that portion of the avenue upon which the defendants' viaduct stands opened as a part of the public street, but that the only streets for public use which existed in Fourth avenue, or to the use of which they were entitled, were streets forty-two feet in width upon each side of the viaduct occupied by the defendants.

The plaintiff, however, contends that the increase in width of the viaduct from twenty-six to fifty-six feet was an additional burden upon the plaintiff's land, and, therefore, to the extent of such increase, the acts of the legislature and municipal authorities were unauthorized and the defendants' use of the street was an invasion of her rights as an abutting owner. Inasmuch as the trial court has properly refused to find that the plaintiff's easements of light, air and access were invaded or impaired, except by such acts and conditions as were incident to the operation of a steam railroad, to which her grantor consented, we think there was no such added burden as would justify this court in holding as a matter of law that the trial court should have awarded her relief by injunction. While the additional traffic over the defendants' road, resulting from an increased population and an enlarged business, may have added to the number of trains passing the plaintiff's premises, still, as it does not appear that the same number of trains might not have passed and the same traffic might not have been conducted upon the two previously existing tracks, and have been equally annoying and burdensome to the plaintiff's property, and as the consent of Mrs. McGown was unlimited in that respect, it would be difficult to determine the extent of any such added injury, if it exists, or to hold that it was not within the intention of the parties and covered by her grant.

Moreover, when the plaintiff purchased her premises, the defendants' viaduct had existed for many years, had occupied the entire portion of the street where it now stands, and
(491) was used substantially as when this action was commenced. She purchased the premises with full knowl-

edge of its existence, of its purpose and use, and with constructive notice of the defendants' rights. With that knowledge, presumably, she made the purchase for a price which included all proper deductions from its value by reason of the presence of the defendants' railroad, and, hence, lost nothing by being deprived of any of her otherwise appurtenant easements.

Under these circumstances we are of the opinion that the learned trial court was justified in declining to award to the plaintiff the relief demanded, and that this court cannot hold as a matter of law that the discretion of the court below was improperly exercised.

We have examined the various exceptions of the plaintiff relating to the reception and rejection of evidence, to the findings of the court and to the refusal of the court to find as requested, without discovering any that would authorize a reversal of the judgment or that requires further discussion.

The judgment should be affirmed, with costs.

All concur, except PARKER, *Ch. J.*, not sitting.

Judgment affirmed.

Court of Appeals.

MARY J. LEWIS, Appellant and Respondent,
against
THE NEW YORK AND HARLEM RAILROAD, Company, *et al.*, Respondents and Appellants,
Impleaded with the NEW YORK, NEW Haven and Hartford Railroad Company, Defendant.
} 162 N. Y., 202.

Argued January, 1900; decided February, 1900.

(218) VANN, *J.*: The plaintiff claims that the trial court erred in refusing to allow her damages for the effect of the new structures, both temporary and permanent, without considering the effect of the old structure. The defendants claim that the court erred in awarding any damages, or giving any relief whatever, to the plaintiff, because, as against her, they had the right to erect any railroad structure in the street, of any height, within the lateral lines of the old embankment.

The defendants' appeal rests mainly upon the proposition that, by virtue of the Benson deed to the Harlem Com-
(219) pany, in 1832, and possession thereunder for more than twenty years under claim of title exclusive of any other right, the defendants acquired title to the land upon which the steel viaduct now stands. (Code Civ. Pro., Sec. 369; *Baker* v. *Oakwood*, 123 N. Y., 16.)

The situation, when the Harlem Company entered Fourth

avenue and took possession of the strip of twenty-four feet covered by the Benson deed, was as follows: The section had been mapped under the act of 1807, as well as by Benson, and Fourth avenue had been laid down on both maps as one of the streets of the city. Benson had conveyed the entire avenue to the city for street purposes, reserving certain rights, and after thus conveying to the city had assumed to convey said strip to the Harlem Company exclusively for railroad purposes, but the conveyance was effective only as to his reserved rights. After conveying to the city, but before conveying to the company, he had conveyed, by reference to said maps, certain abutting lands to the plaintiff's predecessor in title. The avenue was not opened or built upon, as such, but was a street on paper only. The state and city had given the Harlem road the right to enter the avenue and lay down tracks on said strip, subject to certain drastic conditions, which gave the city supreme control, and to which the company had expressly assented, and, finally, the city had authorized the company "to take possession of the ground owned by the" former and had ordered the latter to construct its road thereon, with leave to use the street for "the purpose of a railroad and for that purpose only." The situation differs from that considered by us in a late case, as Benson had conveyed the street to the city and the abutting land to plaintiff's predecessor before he conveyed to the company, whereas in that case the first conveyance was to the company itself. (*Conabeer* v. *N. Y. C. & H. R. R.R. Co.*, 156 N. Y., 474.)

There is no evidence as to the character of the original entry into the street by the Harlem Company, or the nature of
(220) its claim when or after entering, except as it may be inferred from the facts above mentioned and the subsequent occupation and use for railroad purposes of a portion of the avenue, which was a street *in posse* only and did not become a street *in esse* until twenty years later. Under these circumstances the entry and occupation by the company must be "deemed to have been under and in subordination to the legal title" of the city. (Code Civ. Pro., Sec. 368; Code Pro., Sec. 81; 2 R. S., 293, Sec. 8.) Occupation must not only be hostile in its inception, but it must continue hostile, and at all times, during the required period of twenty years, challenge the right of the true owner in order to found title by adverse possession upon it. The entry must be strictly adverse to the title of the rightful owner, for if the first possession is by permission it is presumed to so continue until the contrary appears. If the occupation begins with recognition of the real owner's estate it is presumed to be subservient, and that the one making the entry intends to hold honestly and not tortiously. The character of the possession depends on the in-

tention with which entry is made and occupation continued. There is no *disseisin* until there is occupation with intention to claim title, and the fact of entry and the *quo animo* fix the character of the possession. The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it, for in the absence of such proof possession is presumed to be in subordination to the true title. (*Brandt* v. *Ogden*, 1 Johns., 156; *Smith* v. *Burtis*, 6 Johns., 197; *Jackson* v. *Johnson*, 5 Cow., 74; *Jackson* v. *Brink*, 5 Cow., 483; *La Frombois* v. *Jackson*, 8 Cow., 589; *Humbert* v. *Rector, etc., of Trinity Church*, 24 Wend., 587; *St. Vincent Female Orphan Asylum* v. *City of Troy*, 76 N. Y. 108; *Doherty* v. *Matsell*, 119 N. Y., 646; *Kneller* v. *Lang*, 137 N. Y., 589; *DeLancey* v. *Piepgras*, 138 N. Y., 26; *Heller* v. *Cohen*, 154 N. Y., 299, 311; Tyler on Ejectment, 860; Buswell's Lim. & Ad. Poss., 380; Am. & Eng. Encyc. of Law (2nd ed.), 778.)

The entry by the Harlem Company was by the express permission of the city, under a resolution which recited that
(221) the land entered upon was at the time owned by the city. The occupation was permissive from the outset, and as there is no adequate evidence to the contrary, is presumed to have so continued ever since. The company recognized the title of the city by assenting to resolutions passed by the common council both before and after it accepted the deed from Benson. There was no open or notorious assertion of title under that deed, and no evidence of intention to claim title thereunder, except the deed itself, which was not recorded until after the railroad was built. There is no evidence that the city had notice, either actual or constructive, of that deed until the condemnation proceedings of 1850, when a nominal award was made to the company for its interest in the fee of the street. By an agreement duly executed under its seal, the company expressly covenanted that if permitted to occupy Fourth avenue, it would remove its railroad from the street wherever the city required it. It entered under a licence and remained under a license. Its unbroken continuity of possession from that day to this has never been accompanied with the assertion of any claim hostile to the city, for its deed from Benson, under the circumstances, is no evidence of a hostile claim, but simply that it had acquired Benson's reserved rights, which cut no figure in this controversy. Possession to be effective must be hostile to the rightful owner, and if the company intended to base a claim upon a deed in hostility to the city, the circumstances required it to make the fact known to the city, as otherwise its possession is presumed to be in accordance with its agreement. (*Treadwell* v. *Inslee*, 120 N. Y., 458). The city did not

know that the company had repudiated its agreement and stood on the Benson deed, exclusive of any other right, if such were the fact. It did not know of the existence of that deed, for the record was no notice, as a land owner is not compelled by the Recording Act to watch the records for conveyances of his own property. To authorize the presumption of a grant, the enjoyment "must not only be uninterrupted for the
(222) period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right, and it must be with the knowledge and acquiescence of the owner." *Flora* v. *Carbean*, 38 N. Y., 111; *Bedlow* v. *N. Y. F. Dry Dock Co.*, 112 N. Y., 263; *Parker* v. *Foote*, 19 Wend., 313). When the occupant is in possession under two instruments, one subservient and the other hostile to the true owner, such possession, in the absence of positive notice to the contrary, will be regarded as subservient only, for the law raises a presumption in favor of an honest and against a dishonest purpose. This disposes of the appeal brought by the defendant, so far as it requires discussion apart from the claim of the plaintiff.

The plaintiff's appeal rests upon the proposition that she is entitled to the same relief that she would have been if there had been no railroad structure in the street prior to the erection of the steel viaduct. It would be sufficient to say in answer to this claim that as she asks aid from a court of equity, she can enforce her claim only so far as it is equitable, in the sense of being just. When she crosses the line of equity and good conscience to ask for compensation on the same basis as if Park avenue had never been a railroad street and seeks to recover damages which she has not suffered, on the ground of an alleged technical right, she must withdraw from a court of equity and seek relief at law. Since she or her predecessors submitted without complaint or question to the erection of two railroad structures in front of her property, each of which stood there for more than twenty years and wholly occupied the central portion of the street to the exclusion of all traffic therefrom, it would not be just to claim the same damages for injury to her easements by the third structure that she could properly have claimed if those easements had not been impaired by the previous structures. She has been awarded all that is equitably her due, which is the net difference, measured in money, between the effect of the old and the new structure while in actual use, less the benefits conferred by the latter. She has also been granted an injunction to protect her hereafter, unless her permanent damages are paid
(223) upon the same basis. A court of equity will give her no further relief.

But we will not stop here, for we wish to place our decision

upon grounds equally tenable in either jurisdiction. While the defendants acquired no right by adverse possession, as against the city, they acquired certain rights by prescription as against the abutting owner.

The leading facts bearing upon the subject may be summarized as follows: The lands embraced within the lines of Fourth avenue, as originally laid out upon the maps of the city and of Benson, were, by various conveyances, resolutions of the common council and acts of the legislature, so devoted to street purposes that they could not lawfully be used for any inconsistent purpose. (*Matter of Vil. of Olean* v. *Steyner*, 135 N. Y., 341, 345; *Lord* v. *Atkins*, 138 N. Y., 184, 191; *Haight* v. *Littlefield*, 147 N. Y., 338, 342.) The easements of light, air and access, so far as they had any practical existence prior to 1853 when the avenue was opened, were encroached upon by the first railroad structure, which, in front of plaintiff's premises, was a solid embankment 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. From 1853 until 1873, when the first improvement required by statute was made, the avenue was open and used as a street on either side of the railroad structure in the center, which continued to encroach upon the easements of the abutting owners. From 1873, when the embankment was converted into a viaduct 56 feet wide and 7 feet high in front of the *locus in quo* until 1894, when the last improvement required by statute was begun, the same encroachment continued. As to the plaintiff and her grantors there was an open, continuous and exclusive possession and enjoyment by the railroad company of the easements in question to the extent of the user during the periods named.

Prescription rests upon the presumption of a lost deed, after adverse use and enjoyment for twenty years, which has been adopted by the courts as the prescriptive period from analogy to the Statute of Limitations. (*Woodruff v. Paddock*, (224) 130 N. Y. 618, 624; *Snell v. Levitt*, 110 N. Y. 595; *Nicholls v. Wentworth*, 100 N. Y. 455; *Ward v. Warren*, 82 N. Y. 265; *Parker v. Foote*, 19 Wend. 309, 312; Goddard on Easements, 90; Washburn on Easements [4th ed.] 123; 19 Am. & Eng. Encyc. of Law, 7; Jones on Easements, Sec. 160; Gerard on Titles, 745.) What the primary owner loses by his *laches* the other party gains by continued possession without question of his right. (*Campbell v. Holt*, 115 U. S. 620, 623.) The adverse use must be of the same character and duration as the adverse possession required to give title to real estate, which has already been considered. If the presumption as to a lost deed may be rebutted, still it presents a question of fact which, in this case, has been determined in favor of the defendants. The possession of the defendants was not subordinate to the plaintiff's title, nor permissive as

to her, but openly hostile and necessarily known to be such, to her and her grantors, who made no objection until 1897. It was exclusive, definite and uninterrupted, for it absolutely excluded all from the part of the avenue occupied by the railroad structures. The obstruction was not out of view or knowledge, but in plain sight of the abutting owners, who, by making no objection, acquiesced in the situation. The question does not arise between the railroads and the city, which had consented in advance to the occupation, but between the railroads and the abutting owners, who had not so consented.

Under these circumstances the old structures had stood in the street so long that the railroads acquired a prescriptive right to have them stand there forever, so far as the plaintiff is concerned. The situation was the same in effect as if one of her grantors, while he owned her property, had conveyed to the defendants the right to permanently keep the stone viaduct where it stood and to use it indefinitely for railroad purposes. To the extent of the user by the companies the plaintiff, through the acquiescence of herself and her grantors, had parted with her rights when the present structure was erected. She could claim no damages on account of the old structure, so long as it stood there. She could claim
(225) no damages on account of any new structure erected in the same place, within the same lines, and for the same purpose, which inflicted no more injury upon her property than the old. She could raise no question except such as she could have raised had she given a deed expressly assenting to the erection of the old structure. (*Conabeer Case, supra.*) Had the new structure been no higher than the old, in front of her property, none of her rights would have been invaded, and she would have been entitled to no relief. These views are not inconsistent with but are in accordance with the principles of a case relied upon by the plaintiff, where the defense of prescriptive right failed because the facts failed, as adverse user was not found to have existed for the requisite period. (*American Bank Note Co. v. N. Y. El. R. R. Co.*, 129 N. Y. 252.)

The reason why possession of the same structure was adverse to the plaintiff but not to the city, is that the former never consented to the occupation, except by acquiescence during the prescriptive period, while the latter consented to the occupation in advance, and renewed the consent by subsequent acts at frequent intervals, while the railroad company never gave notice, direct or indirect, that it claimed to occupy under its deed or otherwise than by the consent of the true owner.

Prescriptive rights, however, are measured by the user, and the defendants could make no further encroachment without liability. (*Prentice v. Geiger*, 74 N. Y. 341; *Baldwin v.*

Calkins, 10 Wend. 169; *Bealey v. Shaw*, 6 East, 208; *Stiles v. Hooker*, 7 Cow. 266.) As was said by Judge Andrews in *Prentice v. Geiger* (*supra*): "The right is supposed to have had its origin in a grant, and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted user, according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time." The plaintiff, therefore, was entitled
(226) to recover for the additional injury to her property so far as it was caused by the defendants.

We now reach the question whether the defendants were liable for any part of the damages caused by the effect of the steel viaduct while it was in process of construction.

That structure was not erected by the defendants but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did, but not for what the state did. (*Atwater* v. *Trustees, etc.*, 124 N. Y. 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company "had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by
(227) the railroad nor even by the city, but by an independent board in the creation of which the defendant

had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent." (*N. Y., N. H. & H. R.R.* v. *Baker*, 98 Fed. Rep. 694.)

When the work was completed, if the defendants had not used it, they clearly would have been under no liability to the plaintiff. This is a decisive test, not only as to the permanent structure, but also as to the temporary trestles, which were part of the same scheme of the legislature, acting under general power, as well as that reserved when it incorporated the Harlem Company. They were erected by the same board, in the same way and under the same authority, but for the double purpose of aiding in the principal work of the state, and at the same time affording temporary relief to the defendants in the operation of their trains. The statute "authorized and directed" the defendants to operate their trains on the structures "when completed." Accordingly, they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it.

Thus we strike the time when the liability of the defendants began. When they commenced to use the steel viaduct they started a new trespass on the rights of the abutting owners. While they had a prescriptive right to use a railroad structure standing in the same place and of the same height as the stone viaduct, which was about 7 feet, they had no right, as against the plaintiff, to use the steel viaduct, which reached upward 35 feet until it was on a level with the windows of her fourth story. The new structure, so far as it stood within the
(228) lines of the old, was not a trespass, for it lessened instead of adding to the burden, but so far as it extended above the space which it had to occupy, it was a trespass, for which the defendants have properly been held liable during the time they used it. The trestle work, which stood wholly without the lines of the stone viaduct, was a trespass without mitigation, for it substantially closed the avenue and conferred no benefit whatever upon the adjacent property. As to that structure, the liability of the defendants was absolute during the period of user.

The permanent structure, however, was not an unmitigated trespass, for upon the surface of the street it was a great improvement upon the stone viaduct, which it displaced.

Before the change was made Park avenue was virtually two streets, each 42 feet wide, separated by a solid and impassable embankment 56 feet in width. Now it is 140 feet wide, with no obstruction to traffic except the columns which support the elevated roadbed. Never before could the plaintiff, or her predecessors, cross the street in front of her property, or even cross by the nearest lateral streets. For the first time in the history of the avenue its central portion is open, paved and capable of being used as a street. A substantial benefit was thus conferred, which, in assessing the damages inflicted upon the owner's easements, when no part of his land is taken, should in justice and according to authority be regarded. The basis of assessment is the difference in value of the easements as they now are and as they were with the old, and before the new viaduct was erected. (*Newman* v. *M. E. Ry. Co.*, 118 N. Y. 618, 624; *Bohn* v. *M. E. Ry. Co.*, 129 N. Y. 576, 591; *Sutro* v. *M. Ry. Co.*, 137 N. Y. 593; *Bischoff* v. *N. Y. El. R.R. Co.*, 138 N. Y. 257.) The courts below followed this rule and held the defendants liable for the net difference only.

The claim that the defendants abandoned their prescriptive rights by removing the old structure cannot be sustained. The old structure was not removed by the defendants, but by the state, of its own motion and through an independent
(229) agency created by itself. Moreover, the removal of one railroad structure, followed immediately by the erection of another, in the same place and for the same purpose, is no evidence of an intent to abandon the prescriptive right to have a railroad structure in the street. If the new structure had not been a greater burden than the old the plaintiff would have been entitled to no relief whatever.

The effect of the condemnation proceedings of 1850, which widened the avenue, created no new easements for the benefit of the plaintiff or her predecessors, so far as the original width of the avenue was concerned. This was passed upon in the *Conabeer Case* (*supra*), and requires no discussion.

We have reached the conclusion that the learned trial judge awarded and withheld relief precisely as the law requires, and that his judgment should stand. In reaching this conclusion we have been materially aided by the opinions delivered in the Supreme Court in this and other cases affecting the locality in question, although we have not adopted all of the grounds upon which that learned court proceeded to judgment. (*Taylor* v. *N. Y. & H. R.R. Co.*, 27 App. Div. 190; *Welde* v. *N. Y. & H. R.R. Co.*, 28 App. Div. 379, and 29 Misc. Rep. 13; *Birrell* v. *N. Y. & H. R.R. Co.*, 41 App. Div. 506; *Sander* v. *N. Y. & H. R.R. Co.*, 42 App. Div. 618.)

We have decided the case before us and have not tried to

decide other cases, which, although arising in the same section, rest upon different facts, and may be controlled by different principles of law. While we have carefully read the argument presented by learned counsel in behalf of the intervenors, we have limited its effect, so far as we have followed it, to the facts of this case.

The judgment should be affirmed, but as both parties appealed, without costs to either as against the other.

Parker, *Ch. J.*, Bartlett, Martin, Cullen and Werner, *JJ.*, concur; Gray, *J.*, not sitting.

Judgment affirmed.

Court of Appeals.

CHARLES WELDE, Respondent
vs.
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants, Impleaded with Others.

168 N. Y., 597.

Argued April, 1901; decided October, 1901.

O'BRIEN, *J.:*

(598) The plaintiff is the owner of real property abutting upon Park avenue in front of the railroad operated by the defendants. The Harlem railroad was incorporated in the year 1831, but not constructed until the year 1837. Since that time various changes have been made in its roadbed and structure as well as in the street through which it passes. The questions involved in this appeal are to be determined by the findings of the court which appear in the record and which do not appear to be assailed by either party. The case is presented to us upon these findings, and the only question that we are now concerned with is the proper legal conclusion to be drawn from the facts so found.

What is now Park avenue was laid out on a map as early as the year 1807 to the width of one hundred feet. Subsequently, under a statute passed in 1837, this map was amended and the street as thus laid out was widened so as to constitute an avenue one hundred and forty feet in width; but the street was not actually opened and laid out as such until after the year 1850. It was then opened to the public as a street and subjected to the control of the municipal authorities, and has ever since remained a public street one hundred and forty feet in width, at least from Thirty-fourth street to the Harlem river. The defendants' railroad is constructed and operated in this street, and has been for over sixty years. In January, 1832, one Isaac Adriance, the plaintiff's remote grantor, then

owned the land described in the complaint and the land comprising what is now the bed of Park avenue or the street in question. At that time he executed and delivered to the Har-
(599) lem Railroad Company a deed of a strip of land twenty-four feet in width in the center line of this avenue from the southerly side of One Hundred and Twenty fourth street to One Hundred and Twenty-seventh street, "together with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted as may be necessary to support their works, not, however, extending beyond the width of the avenue." As the avenue was then one hundred feet wide, that was the utmost extent of the grant to the railroad, and it is conceded that whatever rights the defendants acquired under this grant may be asserted against the plaintiff, who has succeeded to the title of Adriance and is bound by any consent or conveyance by him for railroad purposes. It will be seen by the terms of this grant that the railroad was authorized, when necessary, to support the work, to place an embankment in the street to the width of one hundred feet at the bottom in order to procure a proper slope. It is also apparent that wherever it was necessary to make rock cuts or excavations through high ground, that the railroad was authorized to make excavations one hundred feet in width at the surface of the ground, or at least if that was necessary in order to give the proper slope to the excavation. The question arises as to the proper construction of this conveyance. It is obvious that the railroad and not the grantor was to be the proper judge to determine where excavations and embankments were necessary and the proper width and slope of the same within the limits of the one hundred feet. Whether the reasonable and practicable construction of this grant is that the railroad acquired thereby the consent of the property owner to the construction and maintenance of a railroad in the street as then laid out to the width of one hundred feet, or is limited to less than that by other considerations, is a question that would appear to be involved in the case, but may not be necessary to decide in view of the condition of the present record.

This action was commenced on the tenth day of October,
(600) 1895, and at that time, or at the time of the trial, the defendants' railroad was operated in Park avenue upon a steel viaduct structure eighty-two feet wide. It is a structure for four railroad tracks, supported upon five rows of columns, the outer rows of columns being placed substantially along the curb line of the avenue. Longitudinal plate girders were erected over the supporting columns so that the structure, or more properly speaking the columns, were about twelve feet and ten inches distant from the plaintiff's house line. The

main structure is entirely within the limits of the street as originally laid out to the width of one hundred feet, but as the girders extend beyond the main structure and are supported by columns at the curb line of the street, these columns or some of them are beyond the original street lines, but within the lines of the street as subsequently widened to one hundred and forty feet. Prior to the time that this structure was erected the railroad was operated in a rock cut at this point about sixty-two feet in width. The present structure was erected by a commission appointed by an act of the legislature, for the purpose of improving the street and enabling the public to use it to the full width by elevating the railroad structure at a proper height from the surface of the street. The statute which authorized this change in the operation of the railroad is chapter 339 of the Laws of 1892. It appears from the findings that this change was expressly directed by the statute and was the act of the state itself through this commission, the railroad company simply paying a portion of the expense in the form of an assessment. This was the situation, as disclosed by the findings, at the time of the commencement of this action. And an examination of the complaint shows that the action was commenced upon the theory that all these changes were made by the railroad company itself, whereas the trial court fonnd that they were made by the commission under the statute, and that the railroad company could not be subjected to any liability in consequence of anything done by this commission. By chapter 594 of the Laws of 1896, the act of 1892, above referred to, was amended, and the defendants were required to erect and maintain a station at One Hundred and Twenty-fifth street upon a modified structure, the plans for which are particularly specified in the statute. The act directed the railroad to reduce the width
(601) of the main structure to eighty-two feet, as it now is. The structure erected by the commission was much wider. The reason for thus directing the structure to be narrowed was, doubtless, to furnish proper egress and ingress from the station to the trains. Whatever the purpose was, the railroad complied with the mandate of the statute and made the changes precisely in the manner therein specified, and this is the only act which, according to the findings, is to be attributed to the defendants. Since February 16th, 1897, the defendants' trains have been operated on this four-track viaduct structure, as they now are, and so far as appears that was the earliest date of the use of this structure by the defendants. The findings of the court, as they appear in the present record, naturally suggest the following questions:

(1) Did the Adriance deed, before referred to, operate as a consent by the plaintiff's predecessor in title to the mainte-

nance and operation of the railroad in front of his premises in this street covering a space not to exceed one hundred feet wide?

(2) Does the present viaduct structure, so far as it occupies this one hundred feet space, constitute any trespass or invasion of the plaintiff's property rights, and, if so, to what extent? (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

(3) In view of the grant from the plaintiff's predecessor in title, already referred to, and the acts of the legislature above mentioned, is this viaduct structure, upon which the railroad is operated, rightfully and lawfully in the street?

(4) This structure having been erected under the authority of the state itself, in a public street, in order to improve the street for public travel, can the plaintiff maintain an action to enjoin the operation of the railroad, or to recover damages against the defendants, in consequence of the existence of the structure, or its use by the defendants?

(5) The structure, including the changes made subsequent to the year 1896, having been erected in pursuance of the command of the legislature and in precise conformity with the plans and specifications indicated in the statute, has the plaintiff any right of action against the defendants to enjoin the operation of the railroad, or to recover damages, in so far as the structure exists within the original limits of the street, that is to say, within the one hundred feet? (*Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohen* v. *Port Jervis Gas*
(602) *Light Co.*, 122 N. Y. 18: *Cogswell* v. *N. Y., N. H. & H. R.R. Co.*, 103 N. Y. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 N. Y. 212; *D., L. & W. R. R. Co.* v. *City of Buffalo*, 158 N. Y. 266, 478; *Hill* v. *Managers of Met. Asylum District*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Trauman* v. *London, Brighton & S. C. R'way Co.*, L. R. [25 C. H. Div.] 423.

As we are of opinion that there must be a new trial of the case for the reasons which will be presently stated, and as it is possible that the findings may be changed, we do not deem it necessary nor timely to discuss these questions. The facts as they now appear in the record and in the findings of the trial court may possibly be modified hereafter, and, therefore, we leave these questions for consideration when they are necessary to a decision of the case. While the trial court found that this structure was erected by the commission in pursuance of the statute, it did not find expressly whether it was a lawful structure or not, or whether its construction or the operation of the railroad upon it was an invasion of any of the plaintiff's property rights. It is true that since it awarded rental and permanent damages to the plaintiff it might be that the learned trial court was of opinion that the

structure, or at least some part of it, was an invasion of the plaintiff's rights of property. The learned trial judge decided in substance that the railroad was entitled to occupy the street for railroad purposes to the width of sixty-one feet and eight inches, and this proposition seems to have been based on the fact that that was the width of the rock cut in which the train was operated prior to the changes herein indicated. It was not decided whether the defendant was entitled to the use of the street beyond these limits under the grant from the original owner. It may be inferred from the result of the decision that the learned trial judge was of the opinion that the present structure, in so far as it extends beyond the width of the original rock cut, is an unlawful structure and an encroachment upon the plaintiff's rights, although that is not expressly stated in the decision. The learned trial judge, however,

(603) found that from April, 1893, to the time of the trial, the plaintiff's premises had produced an income less by seventy-two hundred dollars than they would have produced if the improvements and changes in Park avenue and in the defendant's railroad structure, as required by chapter 339 of the Laws of 1892 and the amending acts, had not been made; that this loss of income had not been uniform, but had been greater during the years 1894, 1895 and 1896, when the work of erecting that part of the structure which was to be devoted to the station was done, and when the original structure was in part taken down and the modified structure erected and the second station finished and completed. Now all this work, except that of narrowing the structure under the act of 1896, was done, not by the defendants, but by the state through the commission already mentioned, and as we have seen the learned trial judge held that the defendants were not liable for any damage resulting from the action of that commission in erecting the structure. All that the defendants did was to narrow the structure and build a station in the street under the express direction of the legislature contained in the act of 1896. But it is quite apparent that since the learned trial judge awarded to the plaintiff just seventy-two hundred dollars as rental damages, he must have held the defendants liable for the act of the commission in changing the street and erecting the viaduct structure. Very few, if any, of the injurious acts alleged in the complaint have been found by the learned trial court, and such acts of the defendants, as appear in the findings, commanded and contained in the law of 1896, in the modification of the structure by diminishing its width, all occurred subsequent to the commencement of the action. But it may be that the course of the trial justified the court in finding the facts as they existed at the date of the trial, although all these

facts so far as they attributed any interference by the defendants with the plaintiff's light, air and access, occurred subsequent to the commencement of the action.

We think that the judgment must be reversed and a new trial ordered, with costs to abide the event.

PARKER, *Ch. J.*, MARTIN and LANDON, *JJ.*, concur; BARTLETT, VANN and CULLEN, *JJ.*, concur in result.

Judgment reversed, etc.

Court of Appeals.

GUSTAV R. FRIES, Respondent,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.

169 N. Y., 270.

Argued April, 1901; decided December, 1901.

O'BRIEN, *J.*:

The plaintiff is the owner of a three-story frame (273) building on Park avenue, at the southwest corner of 129th street, in the city of New York. The building contains eight stores fronting on the avenue. This avenue is one hundred and forty feet wide, and the defendants own and maintain a railroad therein, and have under some form and under some arrangement for over sixty years. The plaintiff claims that the railroad has invaded his property rights and is a trespasser upon them. For this trespass the trial court held that the defendants should pay to the plaintiff the sum of five thousand five hundred dollars, past and future damages, or, in default of such payment, be perpetually enjoined from operating the railroad. This appeal involves an inquiry into the principles upon which the judgment is founded. There is considerable discussion upon the briefs of counsel who have argued the case concerning the effect of a deed to the railroad by the former owner of the plaintiff's property and many other details relating to the right of the railroad to construct and maintain the same in the street in front of the premises in question.

I cannot perceive how these questions can be of (274) much consequence in the disposition of this appeal, since the trial court made an express finding that under this deed various resolutions and acts of the city authorities at various times and under certain statutes referred to, and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described." Here we have an express finding that on and prior to the date named

the defendants were entitled to have and maintain their railroad in the street in question as against the plaintiff and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned, as follows: "The said railroad prior to February 16th, 1897, was operated along the center of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut." According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street except by means of bridges located at intersecting streets. The court also found that subsequent to the date mentioned the manner of operating the railroad was changed, and this is the finding on that subject: "That subsequent to the passage of Chapter 339 of the Laws of 1892, there was commenced within the lines of Park Avenue and in the center thereof the construction of a new viaduct of iron and steel, said structure being about twenty feet high above the surface of Park Avenue and about fifty-nine feet wide. Said work was done under the supervision of the Board
(275) for Park Avenue improvement above 106th street, and the said structure was completed and accepted by the defendants on February 16th, 1897. That neither of the defendants are liable for any fee or rental damage which may have been sustained prior to that date; that said permanent structure and the operation of trains thereon are, and since February 16th, 1897, have been a continuous trespass upon plaintiff's easement of light and air appurtenant to his said premises, and solely in consequence of said trespass and aside from any other causes the rental value of said premises was depreciated from said date down to April 2d, 1900, the date of trial, in the sum of $1,500."

It will be seen that the trial court held that the present viaduct and the operation of trains thereon, are, and since the date mentioned, have been, a continuous trespass upon plaintiff's easements of light and air appurtenant to his premises. It also found that this structure was built and the trains operated thereon under and in pursuance of the provisions of chapter 339 of the Laws of 1892. An examination of that

statute discloses very clearly a comprehensive scheme on the part of the state for the improvement of Park avenue as a public street by removing the railroad tracks from the cut, closing up the cut and then regulating, grading and paving the street. It was a legislative scheme for the accomplishment of a public improvement. The railroad company had nothing to do with it except to pay such assessment as was imposed upon it by the public authorities to defray the expense of the improvement. Whatever changes were made in the street and in the operation of the railroad were made not by the defendant but by the state in virtue of its general power to improve and regulate public streets. The defendant could not resist the improvement if it would, nor could it refuse when the viaduct was constructed to operate its trains upon it, even if it wanted to, without subjecting itself to a sentence of death at the hands of the state, as all corporations do that refuse to discharge the duties or perform the functions for which they have been created. There is no finding and no claim that the removal of the tracks from the depressed cut to the elevated viaduct was the act of the
(276) defendant. On reading the statute it will be seen that it was an act of the state, and how the defendant in one day became a trespasser upon the plaintiff's property rights it is very difficult to conceive. Another case growing out of this improvement was recently before this court (*Welde* v. *N. Y. & Harlem R. R. Co.*, 168 N. Y. 597), in which the effect of this statute was pointed out. If the viaduct was lawfully constructed and existed in the street under the authority of law, it is impossible to conceive how the defendant could be guilty of a trespass in the operation of its trains upon it. It was constructed for that purpose and the defendant was obliged to use it in the exercise of its franchise and the discharge of the duties due to the public.

The state resolved to displace the railroad in the depressed cut in order to fill up the cut, regulate, pave and grade the whole street, and to this end commanded the railroad to run its cars upon tracks placed upon a viaduct constructed by the state under the statute, and the railroad obeyed. If in doing so it became a trespasser, it must be because the legislation providing for the change violated some property right of the plaintiff which is protected by the Constitution. In other words, it must be because the statute under which the change was made is unconstitutional. I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was

but a consequence of the improvement for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easement interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases, it is held to be *damnum absque injuria*. (*Radcliff's Executors* v. *Mayor, etc., of Brooklyn*, (277) 4 N. Y. 195; *Talbot* v. *N. Y. & H. R. R. Co.*, 151 id. 155; *Folmsbee* v. *City of Amsterdam*, 142 id 118; *Rauenstein* v. *N. Y., L. & W. Ry. Co.*, 136 id. 528; *Atwater* v. *Trustees, Vil., Canandaigua*, 124 id. 602; *Benner* v. *Atlantic Dredging Co.*, 134 id. 156.)

The change from the manner of operating the railroad in the depressed cut to an elevated viaduct was made in precise conformity to the mandate of an express statute, and hence even if the railroad made the change itself instead of the state, it would not be liable to the plaintiff. (*Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohan* v. *Port Jervis G. L. Co.*, 122 N. Y. 18; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 id. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 id. 212; *D., L. & W. R. R. Co.* v. *City of Buffalo*, 158 id. 266; Id. 478; *Hill* v. *Managers of Met. Asylum Dis.*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Truman* v. *London, B. & S. C. R'way Co.*, L. R. [25 Ch. Div.] 423.) The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface. It would seem to be impossible to sustain the judgment in this case without assailing the constitutional validity of the statute under which this change was made, but I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned. But if this were otherwise it is clear that the plaintiff upon the present record is in no condition to raise any such question. He has not raised it in any form in any court, and it cannot be raised for him now as this court has recently held. (*Dodge* v. *Cornelius*, 168 N. Y. 242.) The plaintiff has not only refused to raise any question concerning the validity of the statute in this or any other court, but has actually affirmed its validity by setting it out in his complaint and basing his action upon it. So we have the case of a change in the grade of a street which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that (278) alone is said to constitute the alleged trespass. The plaintiff's claim would seem to be answered by the principle laid down in the *Rauenstein* case, the other

cases first cited, and in *Ottenot* v. *N. Y., L. & W. Ry. Co.* (119 N. Y. 603.) The judgment in this case rests upon what may be called, for want of a better expression, a legal paradox. All that was done that in any way affects the plaintiff's property rights was done, not by the defendant, but by the state. The state engaged in the municipal duty of improving a street in which there was the right to maintain a railroad. It constructed a viaduct in order that the railroad might be operated upon it, and the railroad obeyed. This court has held that the railroad could not resist, which means, of course, that the legislation was valid. (*Lewis* v. *N. Y. & H. R. R. Co.*, 162 N. Y. 226.) On the 15th of February 1897, it is found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the state had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the state compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the state in the exercise of its supreme authority. The conclusion of the learned trial judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.

The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence,

(279) the principles upon which that mass of litigation proceeded have no application to this case, and so this court has held. (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

On reading the opinions in the court below, both at the trial and on appeal, it will be seen that no reason has been given for the judgment, except that it was supposed to be required by something decided by this court in *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y., 202). I do not think that anything was presented, discussed or decided in that case that warrants the judgment in the case at bar. In the first case, the learned judge who gave the opinion in that case was careful to say at its conclusion: "We have decided the case before us, and have not tried to decide other cases, which, although arising in the same section, rest upon different facts and may be con-

trolled by different principles of law." This case does rest upon different facts, comes here in a very different way and is governed by different legal principles, and so is within the saving clause of the opinion. (1) In the first place the legal questions here mentioned were not presented, argued or discussed at all in that case. (2) In that case both parties appealed from a small judgment, and, hence, neither party was bound by the findings, except so far as there was evidence to support them. The evidence in support of the findings was, therefore, open for discussion here, and it will be seen from the report of the case that the discussion proceeded not so much upon the facts found as upon the proofs given, the decision below not being unanimous. The question of title in the railroad and of adverse possession were the principal matters discussed. Here we are relieved from all discussion of the evidence, since we have specific findings that the plaintiff does not question by appeal or otherwise, and that conclude the defendant as to the facts, and so we have a situation entirely different. (3) It was not found in that case that the railroad was lawfully in the street on the day that the present viaduct was completed, but only that it was lawfully in the street at an earlier date by three years. In the meantime it seems that it was shown in that case that the railroad was using an old viaduct constructed of stone, so far (280) as it appears upon its own authority, while in this case no disturbing element of that kind intervenes, and hence we have to deal only with the single question whether the defendant was guilty of a trespass in the use of a viaduct constructed for that purpose by the State under a statute, and which the defendant was obliged to use, whether it would or not. These considerations mark a material distinction between the *Lewis* case and the one at bar. This case is not embarrassed by any such elements as existed in the case referred to. I have quoted the findings upon which this case comes here, and so long as these findings stand in the case, I am unable to see how there can be any recovery.

There are two other questions in the case of minor importance, but which merit a brief notice. The plaintiff became the owner of the premises in question in November, 1891. The second floor of the block was devoted to a dancing hall and the third or top floor to lodging rooms. In 1893 the plaintiff leased the dancing hall to a tenant with the use of the lodging rooms for a long term of years, and in 1896 he leased to the same tenant the corner store and basement. This tenant was in possession, paying the stipulated rent for the premises at the time of the commencement of this action. It will be seen by the findings of the court that the plaintiff

was allowed for the diminution in the rental value from February 16th, 1897. The damage to the rental value, if any, therefore, belonged to the tenant and not to the landlord as to that part of the property which was leased. The plaintiff, who was the landlord, lost nothing by the depreciation, because his rental was fixed long before the trespass began. It is only in those cases where the leasing takes place after the trespass or interference with the easements that the landlord is permitted to recover (*Kernochan* v. *N. Y. El. R. R. Co.*, 128 N. Y., 559; *Hine* v. *N. Y. El. R. R. Co.*, id., 571; *Kearney* v. *Met. El. Ry. Co.*, 129 id., 76; *Witmark* v. *N. Y. El. R. R. Co.*, 149 id., 393).

(281) It must be apparent that at least with respect to the plaintiff's easement of access, it must have been greatly improved by the removal of the railroad from the cut and the grading and paving of the street below the elevated structure. How the change interfered with his easements of light and air it is difficult to conjecture. But assuming that the findings of the court below in that respect are supported by some evidence, it is important to notice the line of proof given as to depreciation in rental and fee value. It appears from the record that the plaintiff called an expert who testified to the course of values in real estate on Madison and Lexington avenues, and was asked if there was anything which should induce the upward tendency in value in these avenues since 1892, which would have obtained in Park avenue had there been no change in the railroad. The questions in regard to the course of values on both these streets were objected to as incompetent. The objection was overruled and the defendants' counsel excepted. It will be seen that the witness was required to institute a comparison between property on Park avenue and on these other avenues for the purpose of proving damages. Park avenue was concededly subject to a servitude as of right for the use and operation of the railroad. Whatever effect that use or operation had upon the abutting property, the defendants cannot be made liable therefor. The other two avenues mentioned were not subject to any such servitude, and it was, I think, improper to give proof under which the court was required to institute a comparison of values between property on these two avenues which were situated so differently from that upon the avenue where the railroad was rightfully constructed and operated. It may be that in the elevated railroad cases proof of this character was admissible for the reason, as has already been pointed out, that in those cases there was no servitude upon the street as against the abutting owner. If, in the case at bar, the defendant had no right to be in the street as against the abutter, then

it may be that the proof would be admissible, but to compare the value of property on two avenues where there was no right to have or maintain a railroad, with property on
(282) another avenue where there was such a right, was improper and misleading.

The judgment should be reversed and a new trial granted, costs to abide the event.

MARTIN, J.:

Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute (L. 1892, ch. 339) under which the acts complained of were performed is valid, and that the legislature did not transcend its powers in enacting it. It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in compliance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damages or loss to which he must submit without other compensation than the benefit he derives from the social compact. It is well settled by many decisions of this court that acts which are authorized by an express enactment of the legislature and performed in good faith upon a work of a public character, do not render the persons performing them liable for consequential damages unless there is an absence of due care or skill in the execution of the work. In other words, an act done under express authority of law for a public purpose, if done in a proper manner, and the property of the individual is not taken or encroached upon, will not subject the party doing it to an action for its consequences whatever they may be,
(283) unless the law itself provides compensation for injuries of that character. This is the rule where public works for the general welfare are constructed or operated.

Moreover, it seems to us that the principles of law relating to the change of the grade of streets, when lawfully made, are

applicable in this case. Here the defendants possessed the right to maintain their railroad and run their trains along and over the street. With their rights, as they then existed, they were content. The sovereign power of the state, however, interfered for a public purpose by a law which expressly and specifically required the grade upon which the railroad was run on this street to be changed, and caused to be erected a steel viaduct upon which the defendants were required to run their trains, so that every act of the defendants of which the plaintiff complains was required by express provision of law. Under these circumstances, it seems quite clear to us that the defendants, as they have not encroached upon the land of the plaintiff or in any way interfered with it, are not liable for any consequential damages the plaintiff may have sustained by reason of the defendants having obeyed the mandate of the statute. These views find support in the following authorities: *Lansing* v. *Smith* (8 Cow. 146); *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195); *Wynehamer* v. *People* (13 id. 378, 401); *Davis* v. *Mayor, etc., of N. Y.* (14 id. 506, 522); *Bellinger* v. *N. Y. C. R.R.* (23 id. 42); *Selden* v. *D. & H. C. Co.* (29 id. 634, 642); *Coster* v. *The Mayor, etc., of Albany* (43 id. 399, 415); *Brooklyn Park Comrs.* v. *Armstrong* (45 id. 234, 245); *Kellinger* v. *42nd St. & G. S. F. R.R. Co.* (50 id. 206); *Losee* v. *Buchanan* (51 id. 476, 480); *St. Peter* v. *Denison* (58 id. 416); *Clemence* v. *City of Auburn* (66 id. 334, 339); *Moore* v. *City of Albany* (98 id. 396, 407); *Uline* v. *N. Y. C. & H. R. R.R. Co.* (101 id. 98, 107); (284) *Conklin* v. *N. Y., O. & W. Ry. Co.* (102 id. 107); *Cogswell* v. *N. Y., N. H. & H. R. R. Co.* (103 id. 10); *Heiser* v. *Mayor, etc., of N. Y.* (104 id. 68, 72); *Bohan* v. *P. J. G. L. Co.* (122 id. 18, 26); *Atwater* v. *Trustees Vil. of Canandaigua* (124 id. 602, 608); *Reining* v. *N. Y., L. & W. Ry. Co.* (128 id. 157); *Egerer* v. *N. Y. C. & H. R.R. Co.* (130 id. 108); *Benner* v. *A. D. Co.* (134 id. 156); *H. R. T. Co.* v. *W. T. & Ry. Co.* (135 id. 393, 411); *Rauenstein* v. *N. Y., L. & W. Ry. Co.* (136 id. 528); *Hill* v. *Mayor, etc., of N. Y.* (139 id. 495, 501); *Folmsbee* v. *City of Amsterdam* (142 id. 118, 122); *Talbot* v. *N. Y. & H. R.R. Co.* (151 id. 155); *Sullivan* v. *Dunham* (161 id. 290, 298); *Huffmire* v. *City of Brooklyn* (162 id. 584, 589); *Uppington* v. *City of N. Y.* (165 id. 222, 228).

While in some of the cases cited the question here is not involved or decided, still, even in those cases the rule suggested has been recognized and admitted to be the existing law of this state.

Aside from the case of *Lewis* v. *N. Y. & H. R.R. Co.* (162 N. Y. 202) the only authorities upon which reliance is placed, to sustain a contrary doctrine, are the elevated railroad cases.

While those cases have created a liability theretofore unknown, which we think should not be extended, still, it seems to us, they are not only clearly distinguishable from a case like this, but should be distinguished on the merits. In those cases, if correctly understood, the only authority the elevated railroad company had to appropriate the street was the consent of the legislature and the municipal authorities. There, there was no law prescribing what they should do or that required them to do it. Here, we have a valid statute which expressly and specifically provides what shall be done as to the change of the grade in this street or the erection of a viaduct, provides the manner in which it shall be done, and appoints, or provides for the appointment of, commissioners to carry the statute into effect. It then directs that upon the completion of such viaduct, the defendants shall run their trains over it. Thus in one case we have a mere consent or permission by the public authorities, while in the other we have an express and mandatory statute requiring the defendants to do precisely what they did, and of which the plaintiff now complains. It seems to us that this distinction requires us to apply the
(285) general principle applicable to such a case and not the special law that has been created by the decisions in the elevated railroad cases.

While I agree generally with the views expressed by Judge O'BRIEN, I still think that the decision about to be made can be said to be in conflict with the *Lewis* case, and to such extent as it is, the *Lewis* case should be regarded as limited.

CULLEN, *J.* (dissenting).

I dissent from the decision about to be made because I regard it as not only inconsistent with our recent decision in the case of *Lewis* against this defendant (162 N. Y. 202), but as opposed to the prevailing law of this state. Four propositions are settled law with us: 1. That the damage inflicted on an abutting owner by a change in the grade of a street does not constitute a taking of property within the meaning of the Constitution, and that the abutter is not entitled to compensation for such injury unless some statute awards it. (*Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & Harlem R.R. Co.*, 151 id. 155.) 2. That the use of the surface of a street or highway for the purpose of a railroad does not invade any property right of an abutting owner who has no title to the soil of the street. (*Kellinger* v. *F. S. St. & G. S. F. R.R. Co.*, 50 N. Y. 206; *Forbes* v. *R. W. & O. R.R. Co.*, 121 id. 505.) 3. That an abutter has an easement in the street for the purposes of light, air and access; that the erection of an elevated structure for the purpose of carrying a railroad thereon is an invasion of such easement and an appro-

priation of the abutter's property rights, for which, under the Constitution, he must be compensated. (*Story* v. *N. Y. El. R.R. Co.*, 90 N. Y. 122. See all the elevated railroad cases since that decision.) 4. That while the public authorities may raise the grade of a street for street use, or may authorize the construction of a surface railroad on the street, in either case without liability to abutters, they cannot raise the
(286) grade of a street for the exclusive use of a railroad without compensating an abutter for the injury inflicted. (*Reining* v. *N. Y. L. & W. Ry. Co.*, 128 N. Y. 157.) The circumstances which distinguish a case which falls under one rule from one which falls under another rule are readily apprehended, and the rules are of comparatively easy application. Whether the difference in circumstance is such as to justify the distinction in principle which prevails in our state is quite another question. I admit that two rules of law, one of which declares that raising the grade of a street and the construction of a bank of solid filling opposite an abutter's premises is *damnum absque injuria*, and the other, which holds that the erection of an elevated railroad is an invasion of the property rights of an abutter which cannot be constitutionally effected without compensation, may seem somewhat inconsistent. But I intend not to be led into a discussion of that subject. It is sufficient to say that such is the settled law of the state, and that the rules which I have stated, consistent or not, exist in full force and integrity in our jurisprudence at this very time, and that on their authority we are deciding cases at almost every term of court. I may, however, remark in passing that if the attempt is to be made to harmonize the law on this subject, surely it should not be in the direction of extending the doctrine of *Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*. That case has been repudiated in many jurisdictions, and though firmly imbedded in the law of this state, the hardships occasioned by its application have been so great that in most cases legislative enactments have given abutters the right to compensation for their injuries. If while the legislature can authorize the laying of a surface railroad without compensation to the abutter, it cannot authorize the construction of a viaduct for an elevated railroad unless compensation be made to the abutter, it must be equally without power to transform a surface road into an elevated road without providing for such compensation. It necessarily follows that, notwithstanding the legislature might have authorized the grade of Fourth avenue to be raised to the height of the structure for the erection of which the plaintiff brings this action, without liability to abutters, that structure invades the plaintiff's property rights, an invasion for which he

is entitled to compensation. To relieve the defendant
(287) from liability for such compensation it must trace its right to maintain the viaduct as against the abutter, not to the act of the legislature alone, but to a grant of some private property easement to which the plaintiff's title is subordinate or to prescription, which is merely the presumption of such a grant.

It is said that the legislature had power to authorize the improvement of Fourth avenue and to direct the railroad company to elevate its tracks. This cannot be doubted. But it could not relieve either the commissioners or the railroad company from paying for any private property taken for the improvement. If I am right in the proposition repeatedly held by this court that an abutter has an easement of light, air and access in a street as against all structures therein except those to be used for strictly street purposes, and as against all improvements save a change in the grade of the street itself, then the situation in no way differs from that which would have been presented had the legislature turned the railroad company off the street altogether and made it construct a new line on adjoining property. In either case the railroad company would be bound to pay for what it took. These propositions were not discussed in the *Lewis* case, but were assumed as settled by the previous decisions of this court and that decision could not have stood on any other foundation. What here has been written, there passed without the saying. In the *Lewis* case the defendant was held not to be answerable in damages until it began running its trains over the structure. This ruling did not proceed on the theory that the construction of the viaduct worked no trespass on the plaintiff's rights, but on the ground that the defendant did not participate in that trespass until it went into possession of the structure and ran its trains thereon. There is no inconsistency between the *Lewis* case and that of *Conabeer* against this defendant (156 N. Y., 474). The same learned judge that wrote in the earlier case concurred in the opinion delivered in the later case. In the *Conabeer* case the trial court found as a matter of
(288) fact that no injury to the plaintiff's easement was occasioned by the new structure. In the *Lewis* case and in the present one the findings of fact are the exact reverse.

It is said that the trial court has found the structure to be lawful and that such finding is binding upon us. The finding is merely one of law and properly construed it is correct. An obstruction in a highway that would otherwise constitute a nuisance may be authorized by the legislature; but, of course, the party creating it would have no right to maintain it as against the owner of the soil of the highway. Yet the main-

tenance of the obstruction would be properly characterized as lawful, that is to say, as having the authority of law and as not being a nuisance. It is further contended that for the plaintiff to succeed, the statute authorizing this improvement must be held unconstitutional and that as no question of its constitutionality was raised in the trial court none can be raised here. The statute is not unconstitutional and no decision to that effect is necessary to secure the plaintiff's rights. If an act were passed by the legislature authorizing a corporation to construct a bridge across the Hudson river above Waterford, it would be unconstitutional because the Constitution prohibits the enactment of a special law for such purpose. If, however, the act authorized the construction of a bridge at the Highlands (the Constitution permitting special acts for bridges over the Hudson river below Waterford) it would not be rendered unconstitutional by the fact that the company did not own a rood of ground in either of the counties which border on the river at that point. The statute would simply be inoperative until the company acquired the necessary land.

As this is a dissenting opinion, I do not deem it necessary to discuss the extent of the right acquired by the defendant through private grant. It is sufficient to say that it is not greater than that carefully examined and considered in the *Lewis* case, and that it is of the same general character. If my difference with the majority of the court related merely to that subject I should be content to confine myself
(289) to the record of my vote. It is against what I consider the broad and far-reaching doctrine of the prevailing opinion that I feel constrained to express the reasons for my dissent.

MARTIN, J., in memorandum concurs with O'BRIEN, J.; PARKER, Ch. J., and LANDON, J., concur with O'BRIEN and MARTIN, JJ.; BARTLETT and VANN, JJ., concur with CULLEN, J.

Judgment reversed, etc.

Court of Appeals.

HENRY MUHLKER, Respondent and Appellant,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants and Respondents.
} 173 N. Y., 549.

Argued October, 1902; decided February, 1903.

PARKER, *Ch. J.:*

The facts in this case present the same question that was before this court in the *Lewis Case* (162 N. Y. 202)
(551) and the *Fries Case* (169 N. Y. 270) and that is, whether defendant is liable for any damages that may have

been sustained by plaintiff by reason of the interference with his easements of light, air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging to the plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (Ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the state compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the state pursuant to ch. 339, Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that prior to the time when the operation of its trains was transferred from the subway to the viaduct it had acquired the right as against the abutting owners to maintain its railroad and run its trains along and over Fourth avenue. (*Fries Case, supra.*)

In 1890 Congress passed an act directing the secretary of war to cause the bridges over the Harlem river to be replaced by other bridges which should be at least 24 feet above the high water of the spring tides. (U. S. Statutes at Large, vol. 26, p. 437.) As defendant's road crossed one of these bridges, compliance with the provisions of this act made necessary a change in the grade of defendant's railroads, and the act provided that such changes should be made as
(252) soon as the necessary legislation could be obtained to authorize a change in the grade of the approaches to the bridge.

About two years later the legislature passed the act already referred to by which it undertook to accomplish the result aimed at by Congress in such a manner as actually to improve the use of the street itself, a part of the scheme being to compel this defendant to operate its road upon a steel viaduct elevated above the ground, thus giving the public the use of the whole of the surface of the street which before was impossible.

This improvement was made by the state for the benefit of the public, the expense of it, by the mandate of the State, being borne by the city and this defendant in equal proportions. What was done by the state and the legal effect of its action upon the rights of this defendant cannot be better

stated than it was by Judge VANN in the *Lewis Case* (*supra*) and so I quote it:

"That structure was not erected by the defendants, but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did but not for what the state did. (*Atwater* v. *Trustees of Vil. of Canandaigua*, 124 N. Y., 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want (553) of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by the command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in the late case, the railroad company 'had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employes it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent.' * * * The statute 'authorized and directed' the defendants to operate their trains on the structure 'when completed.' Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their accept-

ance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it."

Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was,
(554) briefly, that the state, setting about making improvements in Fourth avenue which were to benefit the general public, found defendant in possession of four tracks in the middle of the avenue, with the right to operate its trains upon them, which it was enjoying. The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct over the part of the street formerly occupied by the subway and compelled it to stop running its trains in the subway and to run them on the viaduct instead. The state had the power to do these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built.

The plaintiff was injured by the change, as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the state, which had the power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the state.

When the question was again presented, therefore, as it was in the *Fries case* (*supra*), we attempted to cure the error which we concluded we had made in the *Lewis* case. The opinions in the *Fries* case were written by Judge O'BRIEN and Judge MARTIN. In the course of Judge O'BRIEN'S opinion it is said:

"I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the

improvement, for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements
(555) interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria.*"

Judge MARTIN states the principle as follows: "It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in accordance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill, and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensation than the benefit he derives from the social compact."

The judgment was accordingly reversed. That decision was deliberately and carefully made, and reflected the view of a majority of the members of this court at that time, and still does.

The dissenting opinion cited, and correctly, the *Reining Case* (128 N. Y. 157) as authority for the proposition that "while the public authorities may raise the grade
(556) of a street for a street use, or may authorize the construction of a surface railroad on the street, in either case without liability to the abutters, they cannot raise the grade of a street *for the exclusive use* of a railroad without compensating an abutter for the injury inflicted." But that proposition is not involved in this case. Here the state did not authorize a change in the street for the exclusive use of the railroad. The change was made for the public benefit as well as for that of the railroad, and for that reason the state compelled the city of New York to pay one-half of the expense of it.

The decisions in the elevated railroad cases are not in point.

There no attempt was made by the state to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for.

It is again urged on this appeal that the act under which these changes were made is unconstitutional, and hence that defendant need not have obeyed its commands. But that question was considered and passed upon by this court in the *Fries* case, every member of the court, whether voting with the majority or minority, agreeing that the act was constitutional. Judge O'BRIEN said, in discussing the constitutional question: "I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned." And Judge MARTIN commenced his opinion by saying: "Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute under which the acts complained of were performed was valid, and that the legislature did not transcend its powers in enacting it." And Judge CULLEN said: "The statute is not unconstitutional and no decision to that effect is necessary to secure plaintiff's rights."

We still think, under the authority of *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195) and the other cases cited by Judge MARTIN in his opinion in the *Fries* case, that the state had the power to make this improvement, as
(557) it did, without compensation to the abutting owners. Undoubtedly the state had also the power to provide in the act for compensation to abutting owners, and to apportion the expense incurred in the acquisition of the easements destroyed upon the defendant and the city of New York, as it apportioned the expenses of building the viaduct and making the other changes in the street; and it still has the power to authorize ascertainment of the damages to the abutting owners through its Court of Claims and to provide for their payment, and it may well be that it would be equitable for it to do so. But that it possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as resulted from the partial destruction of their easements of air, light and access, we have no doubt. Indeed, if in the judgment of the legislature it had seemed wise and just to do so, it could have assessed a portion of the expense of the improvement upon the abutting owners instead of placing it all upon the defendant and the city.

The judgment should be reversed and the complaint dismissed, without costs.

BARTLETT, J. (dissenting).

This is one of a large number of cases brought against the defendant railroad companies to recover damages for the erection of the steel viaduct in Park avenue, extending from near 106th street to the Harlem river, and over which the defendants operate their railroad with some two hundred trains a day.

The plaintiff recovered three thousand dollars fee damages and fourteen hundred dollars rental damages from February 16th, 1897, to October 10th, 1900, which was the date of the trial. The former date, February 16th, 1897, is the day on which the defendant companies began running their trains. The judgment of the Appellate Division was entered on the 29th day of April, 1901.

The case of *Fries* against these defendants was not decided in this court until December 31st, 1901. (169 N. Y. 270.)

The plaintiff appealed from the judgment on the ground that he was limited in his recovery by an improper rule
(558) as to the measure of damages, the court holding that he was not entitled to recover damages prior to February 16th, 1897, the day the steel viaduct was completed.

The counsel for the defendants also appeals, contending that our decision in the *Fries* case is conclusive as to all questions presented in the case at bar, and nothing remains to be decided.

The counsel for the plaintiff attempts to distinguish these cases as follows: (1) That in the *Fries* case there was a finding that the defendants had "acquired the right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897," and in the case at bar there is no such finding; (2) that Fourth or Park avenue, in front of the premises in suit, was a public street prior to the defendants' entry into the same.

(The premises involved are situated at the northwesterly corner of Park avenue and 115th street, and the viaduct structure of iron and steel in front of these premises is about 59 feet wide, and consists of four tracks laid on a steel structure, having a mean elevation of about 31 feet above the surface of said avenue. Prior to the erection of this viaduct, the tracks in the subway were at the south line of the plaintiff's premises, about level with the surface of the avenue, and at the north line about five and one-half feet below it. This subway was completed and trains began to be operated in it in 1878); (3) that in the *Fries* case the act of 1892 was assumed to be constitutional, and in this case its constitutionality is controverted; (4) that the rule of *damnum absque injuria* has no application to this case.

The plaintiff contends that Fourth avenue was a public

street at the time the Harlem Railroad Company, which is the lessor of the Central and Hudson, was organized.

Twenty-four feet of Fourth avenue, as it was then called, in front of the premises in question, were conveyed to the city July 24th, 1827, by Poillon.

In January, 1832 (the Harlem Railroad Company having been incorporated in 1831), Poillon conveyed to the
(559) Harlem Railroad Company 24 feet in Fourth Avenue, but at that time he had nothing to convey; he also refers in that conveyance to, and sanctions the map of New York, filed by the commissioners in 1811 under the act of 1807.

So far as these premises are concerned, it would seem as if the only right the Harlem Railroad Company acquired in the street, if any, was a prescriptive one, that would be no broader than its actual occupation. (*Lewis Case*, 162 N. Y., 202.)

It is true that Poillon's deed to the city was never recorded, but this was not essential in order to create a highway. (*Driggs* vs. *Phillips*, 103 N. Y., 77). Furthermore, the Harlem Railroad Company could not be regarded as a purchaser in good faith and for a valuable consideration, and under the provisions of its charter and its agreement with the city, and the ordinance of the board of aldermen following the agreement, it would seem to have entered upon Fourth Avenue under all the restrictions in these various documents contained, and was in no sense the exclusive owner of the fee of the street, getting title from a private grantor.

The charter of the company is found in the Laws of 1831. The agreement bears date January 9th, 1832, and the ordinance was passed by the board of aldermen on January 20th, 1832.

In less than twenty years after any of these dates the city began condemnation proceedings to widen Fourth Avenue, which was then 100 feet wide, and it was proposed to add twenty feet on each side, which was condemned, and the 100 feet, representing the old street, was marked "ceded." It does, however, appear in some of these litigations that a decree of condemnation went in form against the Harlem Railroad Company as to the portion of the street occupied by it, declaring a condemnation in consideration of one dollar. This report was confirmed sometime in the year 1850.

The changes in Fourth Avenue, as it was then called, and the railroad structure under the act of 1872, resulted in a new state
of affairs as to the grade of the tracks, both on viaducts
(560) and in cuts, which were not completed until 1878. It, therefore, follows that the contention of the defendants, as to undisputed title in the avenue, in front of the plaintiff's premises, cannot be maintained.

The claim that the act of 1892 is unconstitutional cannot be sustained.

If it be true that the defendants have no legal right, by reason of grant or prescription, to erect this steel viaduct to the height of 31 feet in front of the premises in question, the effect of the act of 1892 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of light, air and access have been invaded.

The mere fact that the act does not provide for compensation has no controlling effect. The legislative sanction to construct what would otherwise be a nuisance in a public street does not imply the power to take the easements of abutting owners, which are property, without compensation.

The fundamental error in the *Fries* case is the assumption that the doctrine of *damnum absque injuria* is applicable.

In the prevailing opinion in that case the learned judge said: "So we have the case of a change of grade in a street, which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass."

If this statement was correct, it would be too clear for argument that the doctrine of *damnum absque injuria* would apply to this case.

The fact is that there was no change of the grade in Park Avenue. The title of chapter 339 of the Laws of 1892 reads: "An act to regulate, improve and enlarge Park Avenue above 106th Street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, *and for the elevation of said railroad structure, and for changing the grade of said railroad*, and for the construction of a
(561) new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary *by reason of such change in structure and grade and increased elevation of bridge*, and for other purposes."

It is profitable at this point to consider in detail the history of this act.

The Federal government determined to raise the height of the bridge which was in use by the railroad companies The State of New York, as in duty bound, passed this act in question to carry out the change which Congress had decided should take place.

This act in brief directed that the grade of the Harlem Railroad Company's track should be raised between 106th Street and the Harlem river. This was done in order to accommodate it to the new bridge.

The mayor of the city of New York was authorized by sec-

tion thirteen to appoint a board to be known as "The Board of the Park Avenue Improvement above 106th Street," whose duty it was to execute contracts and superintend the construction of said improvement. Upon the completion of the work the counsel to the corporation of the city of New York was required by section sixteen to apply to the Special Term of the Supreme Court in the first department for the appointment of commissioners to determine the area of assessment to raise money to pay for the bonds to be issued by the city in payment of its share of the work.

The act provided that the city of New York should pay one-half and the railroad company the other half of the cost of this work if it did not exceed a million five hundred thousand dollars; if it exceeded that amount the railroad company was to pay the entire excess.

As I understand the *Fries* case, the majority of the court held (1) that this was work of a public nature, and that the railroad company was not liable for injury to the easements of light, air and access unless there was a want of skill, or
(562) negligence, in the performance of the work; (2) that the principles of law relating to the change of grade of streets, when lawfully made, are applicable to this situation, and that the doctrine involved in the elevated railroad cases has no application.

The act upon its face shows that the legislature did not consider it was providing for a public work for which the state was to be liable. The provision that a small portion of the city and the railroad company shall pay between them the cost of this work, and if it exceeded a certain sum the excess should be paid by the railroad company, is conclusive evidence that it does not contemplate a public work, inflicting damages which can only be recovered under a special provision of law, or by showing negligence or want of skill in the performance thereof.

The raising of the bridge by act of Congress contemplated, it is reasonable to suppose, the making of the navigable tide waters of the Harlem river accessible to vessels of greater draught, with taller masts and smokestacks, thereby benefiting the city of New York and incidentally the great railroad corporations using this bridge, they being interested in the growing prosperity of the municipality and the improved facilities for entering the city of New York by land and water.

These considerations and the details of the act already referred to, lead me to the conclusion that this work was not of the character assumed by the prevailing opinions in the *Fries* case. If it were of that character, then it was unjust, and even unconstitutional for the legislature to have imposed

any portion of the cost of this work upon the railroad corporations and a small section of the city of New York included in an area of assessment to be fixed by commissioners.

We thus have a situation presented similar to that in the elevated railroad cases, to wit: An elevated structure in the center of a public street, extending in places to the height of thirty-one feet, for the express purpose of elevating the railroad tracks so as to connect with the new bridge.

In my opinion to hold that the act of 1892 provides for raising the grade of Park avenue, is judicial legislation,
(563) and introduced in the *Fries* case a fact not disclosed by the act itself, and not discussed at our bar when that case was argued.

These cases present a situation covered by the case of *Reining* v. *N. Y., L. & W. Ry. Co.* (128 N. Y. 157). While the case cited does not present facts similar to the one at bar, yet the principle involved is precisely the same.

It was there held that a municipality could not, under the guise of exercising the power to alter the grade of a street, appropriate a part of the street practically to the exclusive use of a railroad company and cut off abutting owners without compensation from using any part of it in the accustomed way. In other words, this was a limitation of the power of the common council conferred upon it by the legislature in the city charter of Buffalo.

Judge ANDREWS, in applying the law of elevated railroad cases, as laid down in the *Story* case, said: "It is no longer open to debate in this State that owners of lots abutting on a street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation."

It was expressly held in the case cited that the erection of an embankment in the street, and running parallel therewith, and occupied by a railroad company, was not a change of the grade of the street.

That the legitimate change of the grade of a street, to the damage of abutting lot owners, is damage without injury, is the settled law of this state, but it involves a principle that has been condemned in many jurisdictions, and the hardship of which has been cured in some of the states by constitutional amendment providing for the payment of such damages. It is a doctrine which ought not to be extended.

I am of opinion that the law controlling the elevated railroad cases is applicable here, and that the decision in the
(564) *Fries* case reversed a rule of property under which millions of dollars have been paid out by the elevated

railroad companies to abutting owners who had no title to the street.

The New York and Harlem Railroad Company is not vested with any title in Park avenue that permits it as the owner of real estate to erect this elevated structure without regard to the injury it may work upon the easements of light, air and access enjoyed by abutting owners. They must settle for damages caused by so much of the structure as exceeds established user.

In several of the cases now before us it appears that the city received a conveyance of the fee before the railroad company took the deeds from grantors, who practically had nothing to convey. In another case there is a title under condemnation proceedings against an infant in 1830, presumably securing to the railroad company the right to operate its road on the strip twenty four feet wide.

The details of the railroads' title were carefully and elaborately examined in the *Lewis Case* (*supra*).

I am of opinion that this invasion of the easements of abutting owners has vested in them a valid claim against the railroad company, and if this court adheres to its decision to the contrary, on the ground that it was a public work ordered by the state, then these damages are a valid claim against the state.

I have no disposition to urge, unduly, the reconsideration of the principles of law laid down in the *Fries* case. I understand that the court desires a full and free discussion of this entire question. I shall be content, if a result is reached in these cases adverse to the plaintiff, so long as I place myself on record as dissenting, on the ground that it reverses the *Lewis* case and adopts a principle that is at war with the long line of decisions in the elevated railroad cases and the established law of the state.

If this judgment is reversed it should be without costs.

I vote for affirmance.

CULLEN, *J.* (dissenting). I concur in the opinion (565) of Judge BARTLETT and dissent from the decision about to be made. I feel that I am not precluded from taking this course by the previous decisions of this court, for against the authority of the *Fries* case may be fairly set off that of the *Lewis* case. But the court having on this appeal re-examined the whole question involved in both the cases cited, and determined that the plaintiff is not entitled to compensation for the injuries to his property complained of, I must hereafter subordinate my judgment to that of the majority, and shall regard subsequent discussion of the question as foreclosed by the action of the court in the present case.

HAIGHT, MARTIN and WERNER, *JJ.*, concur with PARKER,

Ch. J.; BARTLETT, *J.*, reads dissenting opinion, and CULLEN, *J.*, concurs in memorandum; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

JOHN KEIRNS, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.
} 173 N. Y., 642.

Argued November, 1902; decided February, 1903.

Per Curiam.—Judgment reversed and the complaint dismissed, without costs, upon the authority of *Fries* v. *N. Y. & Harlem R.R. Co.* (169 N. Y., 270), and *Muhlker* v. *N. Y. & Harlem R.R. Co.* (173 N. Y. 549).

VANN, *J.* (concurring):

The plaintiff's property is in the next block to that in which the property of the plaintiff in the *Lewis* case was situated. (*Lewis* v. *N. Y. & Harlem R.R. Co.*, 162 N. Y. 202.) The essential facts of the two cases differ in no particular that would prevent a recovery in one unless they would also prevent a recovery in the other. Since the decision of the *Lewis* case, however, the *Fries* case has been before us, in which a new point in the litigation was discovered by a majority of the court that was not raised by counsel or considered by us in the former case. (*Fries* v. *N. Y. & Harlem R.R. Co.*, 169 N. Y. 270.)

The *Lewis* case was argued and decided upon the theory that the entry of the railroad company into Park avenue was in subordination to the legal title of the city; that by user for more than twenty years the company obtained by prescription as against the abutting owners the right to maintain a permanent structure within the same limits and at the same height as previous structures, and to the extent of the com-
(643) pany's user for twenty years acquired the exclusive right to interfere with the easements of light, air and access; that the railroad company could not be charged with the damages which the easements of the abutting owners suffered from the construction, itself, by a governmental agency, of the last structure, but that when the defendants used it they became liable from that time for such damages as the easements suffered from such user to the extent of the increased height of the third structure, after deducting the benefits received from increased facility of access.

On the other hand, the *Fries* case was decided upon the theory that, as against the abutting owner with no title to the avenue, the state had the right to require the grade upon which the railroad was run to be changed; to cause to be

erected a steel viaduct, and to compel the defendants to run their trains thereon, and in the absence of any statute providing for compensation, that they were not liable for remote or consequential damages sustained by the abutting owners.

This point, although radical, was entirely new, and had it been raised in the *Lewis* case might have resulted in a reversal instead of an affirmance. While the judgment of the court in that case was by the unanimous vote of all the judges who sat, and the judgment in the *Fries* case was by a bare majority, and while I regret the result reached in the latter as amounting to the confiscation of property belonging to abutting owners, and a gift thereof to railroad corporations, I now yield to it as establishing the law of the state, since the principle upon which it rests has been sanctioned and applied in another case by this court. (*Muhlker vs. N. Y. & Harlem R. R. Co.*, 173 N. Y., 549.)

I concurred in the dissenting opinion of Judge Cullen in the *Fries* case and should have concurred in that of Judge Bartlett in the Muhlker case had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal.

PARKER, *Ch. J.*, BARTLETT, HAIGHT, MARTIN and WERNER, *JJ.* (and VANN, *J.*, in memorandum), concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

HEDEWIG KRIETE, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.
} 175 N. Y., 484.

Argued May, 1903; decided June, 1903.

Per Curiam:

We decide on authority of the *Fries Case* (169 N. Y., 270), and the *Muhlker Case* (173 N. Y., 549), that under the statute requiring the structure complained of the plaintiff has no remedy against this defendant.

The constitutionality of the statute being questioned, we hold (1) that it does not violate the State Constitution, (2) that it does not offend against that provision of the 14th amendment of the Federal Constitution providing that a person shall not be deprived of property without due process of law, and (3) that it does not contravene section 10 of article 1 of the Federal Constitution forbidding the impairment of the obligation of a contract.

The judgment should be reversed and the complaint dismissed, without costs.

PARKER, *Ch. J.*, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, *JJ.*, concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

NORA DOLAN *et al.*, Respondents,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY *et al.*, Appellants, Impleaded with Another.

175 N. Y., 367.

Argued May, 1903; decided June, 1903.

HAIGHT, *J.*:

This is one of a group of actions brought by the abutting owners on Park avenue in the city of New York to restrain
(368) the maintenance and operation of the defendants' railroads upon the viaduct structure through that street, or, as an alternative, to recover damages resulting to the fee and rental value of the premises.

The plaintiffs' premises are situated on Park avenue, between 124th and 125th streets, abutting upon the de-
(369) fendants' railroad stations at 125th street. The station is upon the viaduct structure, widened out so as to provide a suitable platform on which passengers may enter or alight from trains, and is reached by stairways from the street.

The complaint in this action demands judgment that the defendants be enjoined from maintaining a station, platform and appurtenance thereto in front of the plaintiffs' premises, as well as that of the elevated railroad structure. The trial court awarded judgment in favor of the plaintiffs for fee and rental damages, which included the damages suffered by reason of the operation of the defendants' trains upon the viaduct. For this reason the judgment must be reversed, upon the authority of *Muhlker* v. *New York & Harlem Railroad Co.* (173 N. Y. 549) and *Fries* v. *New York & Harlem Railroad Co.* (169 N. Y. 270). The only question remaining to be determined upon this review is as to whether the complaint should be dismissed or a new trial granted, and the determination of that question involves an inquiry as to whether the plaintiffs can recover damages by reason of the construction and maintenance of the defendants' depot at that place.

Prior to 1892, the defendants had acquired the right to maintain and operate their railroad through Park avenue in a subway or cut bounded on either side by walls of masonry. This not only prevented the use of a large portion of the street for municipal purposes, but it also seriously interfered with the passage of teams between those portions of the city

lying on opposite sides of Park avenue. Under these circumstances the legislature enacted chapter 339 of the Laws of 1892. By this act a board was created to erect a steel viaduct through Park avenue from 111th street to the Harlem river, and after its completion the defendants were required to run their trains over the viaduct. The cut in the street was then required to be filled, and the surface paved.

The evident purpose of this legislation was to
(370) open up Park avenue as a street through its entire width, and to facilitate travel across the same between the portions of the city lying on either side of the street. This was a public improvement effected through a governmental agency, over which the defendants were given no voice or power to control the operations of the board. It was consequently held in the cases to which we have referred, that the defendants were not liable for the damages resulting to abutting property owners from the operations of their trains on the viaduct. The same statute further "authorized and permitted" the defendants, at their election, to erect station houses on both sides of the railroad at 125th street with platforms extending from the north line of 124th street to the south line of 125th street. This statute was amended by chapter 594 of the Laws of 1896, in which the defendants were not only authorized but *directed* to erect and maintain such stations, specifically specifying the size, place and character of the structure.

It is contended on behalf of the defendants that inasmuch as they were compelled to construct the stations, under the amendment of the act, they are relieved from liability for damages to abutting owners of property, upon the same theory and for the same reasons that they have been relieved from liability for the construction of the viaduct. But we think there is a controlling distinction between this and the former cases, and that our decisions in the *Fries* and *Muhlker* cases have no application. In those cases, as we have seen, the government built the structure for the purpose of effecting a great public improvement. In this case the government requires the defendants to provide suitable and proper facilities to enable their patrons to safely and conveniently enter and alight from their trains. A railroad corporation in accepting a charter from the state impliedly undertakes to afford reasonable and proper facilities for the transportation of passengers and freight, and if it neglects it may be compelled to discharge its duty in this regard. Under the General Railroad Law the construction and maintenance of depots is committed to the judgment of the railroad commission-
(371) ers, who are empowered to direct as to the station houses and terminal facilities that shall be provided.

Under the amendment of 1896 the legislature, so far as these defendants are concerned in Park avenue, has superseded the railroad commissioners, and has by act specified the character, size and location of the stations, and that is all. To our minds the situation is not different from that which would be presented if the railroad commissioners had required a depot and terminal facilities at any other point upon the defendants' lines. If, in complying with such requirements, additional land should be required, it would become the duty of the railroad company to acquire the same and pay therefor. So in the case under consideration. If the station houses occupy more of the street than the viaduct and tend to deprive the plaintiffs of their easements of light, air and access, we think the defendants should pay therefor. The station houses are not constructed by the government for the purpose of accomplishing a public improvement, but are required by the government to be constructed by the railroad companies, under their implied contract with the state, to afford suitable and proper facilities for the accommodation of their own patrons.

While no damages could be awarded by reason of the construction of the viaduct, or of the operation of the trains of the defendants thereon, both fee and rental damages may be awarded, if suffered in consequence of the station houses. We consequently conclude that a new trial should be ordered.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, MARTIN, CULLEN and WERNER, JJ., concur; GRAY, J., not sitting.

Judgment reversed.

Court of Appeals.

AUGUSTA A. KETCHAM, Respondent,
vs.
NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.
177 N. Y., 247.

Argued January, 1904; decided January, 1904.

BARTLETT, *J.*:

This action is brought to recover fee and rental (248) damages of the defendants by reason of the erection of their passenger station at 125th street in the city of New York. The plaintiff's premises are situated on the southwest corner of Park avenue and 126th street, being a plot of seventy-five feet on Park avenue and ninety feet in depth, upon which are erected one-story buildings used for stores, said premises being known by the street numbers 1834, 1836 and 1838 Park avenue. The 125th street

station extends north to 126th street and is consequently in front of plaintiff's premises.

The plaintiff, according to the prayer of her complaint, seeks to perpetually enjoin the defendants from maintaining, continuing or using the elevated railroad structure and its appurtenances and the station, station platform, stair-
(249) ways and appurtenances, tracks, switches, ties, stringers, girders and rails in front of, over or adjacent to plaintiff's said premises, and that defendants be required forthwith to remove said railroad structure, etc., unless the defendants pay to the plaintiff such sum or sums as may be found to be the value of the easements of which the plaintiff has been deprived.

The trial court found (finding IV) that the defendants erected a passenger station at 125th street and Park avenue, a solid iron structure, in front of the plaintiff's premises, which was eventually modified so as to be eighty-two feet wide and twenty-three feet and three inches high.

Finding V reads: "By the adoption of plans for the station, and by the increase of the width and alteration of the structure for the sole purpose of accommodating the station, and by the work done by the defendants themselves or by their contractors, the defendants became parties to the process of construction at this point of the station buildings and appurtenances from the time of the commencement of the work in August, 1893, to its completion in November, 1897."

Finding IX reads: "The plaintiff has suffered damages by reason of the increase of inconvenience from the operation of trains *upon the viaduct structure* since the 16th of February, 1897, not including that from noise, and in the erection and maintenance of a passenger station at 125th street, *and the passing, starting and stopping of numerous trains thereat*, in the depreciation of the value of fee of her real estate in the sum of $11,500, and in the loss of rents from the 16th of February, 1897, down to the date of trial, in the sum of $5,500; the said sums * * * represent as to fee damages and rental damages, respectively, the net difference measured in money between the physical effect of the *former operation of the railroad* upon the premises in suit and the physical effects *produced by the new elevated structure, including the station and its appurtenances* and its use, less benefits conferred upon the same premises by reason of increased traveling facilities and increased traffic."

As this case is one of a large number involving the
(250) same situation, it is deemed proper to state what this court has already decided and to point out the one question which has been left open.

This court has decided that the steel viaduct in Park avenue, upon which the defendants' railroads are now operated, ex-

tending from 104th street to the Harlem river, was a public improvement effected through a governmental agency, and that defendants were not liable for damages resulting to abutting property owners from the maintenance of the structure or the operation of trains thereon. (*Muhlker* vs. *N. Y. & Harlem R.R. Co.*, 173 N. Y., 549; *Fries* vs. *N. Y. & Harlem R.R. Co.*, 169 N. Y., 270.)

It has also been decided "that the station houses are not constructed by the government for the purpose of accomplishing a public improvement, but are required by the government to be constructed by the railroad companies under their implied contract with the state to afford suitable and proper facilities for the accommodation of their own patrons." (*Dolan* vs. *N. Y. & Harlem R.R. Co.*, 175 N. Y., 367.)

A single question is presented by this appeal, the defendants, appellants, contending that the findings of the trial court include, not only the damages, fee and rental, arising from the construction of the station at 125th street, but embrace damages produced by the new elevated structure, including the station and its appurtenances.

The plaintiff insists that, reading the fifth and ninth findings together, it is clear that the trial court limited the damages to the construction and operation of the station.

We are of opinion that the contention of the appellants must be sustained, as it seems to us clear, on a careful reading of the findings, that the trial court did not confine its award of damages to the erection and maintenance of the station building and appurtenances.

Finding IX distinctly states that the plaintiff "has suffered damages by reason of the increase *of inconvenience from the operation of trains upon the viaduct structure* since the 16th of February, 1897, not including that from noise, *and* in the erection and maintenance of a passenger station at
(251) 125th street, and the passing, starting and stopping of numerous trains thereat."

This finding further states, after fixing the fee and rental damages, that they represent "the net difference measured in money between the physical effect of the *former operation of the railroad upon the premises in suit and the physical effects produced by the new elevated structure, including the station and its appurtenances and its use, less benefits conferred upon the same premises by reason of increased traveling facilities and increased traffic.*"

It is clear from the phraseology of this finding that the trial court did not confine the assessment of damages to the station and its appurtenances, but considered the former operation of the railroad upon the premises in suit and the physical effects

produced by the new elevated structure, including the station and its appurtenances.

In *Dolan* v. *N. Y. & Harlem R.R. Co.* (175 N. Y., 367), Judge HAIGHT, writing for the court, said (p. 371): "If the station houses occupy more of the street than the viaduct and tend to deprive the plaintiffs of their easements of light, air and access, we think the defendants should pay therefor."

This language is, in general terms, an indication of the rule of damages to be applied in these station-house cases which have survived the former decisions of this court. It is desirable that the rule should be clearly stated for the guidance of counsel in the trial of similar cases.

If the plaintiff proves that the steel viaduct has been extended beyond the width of the structure between stations, and is clearly a part of the work necessary in erecting the station, and an injury is established by reason thereof, proper damages should be awarded.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, HAIGHT, MARTIN and CULLEN, JJ., concur; GRAY, J., not sitting.

Judgment reversed, etc.